In The

Supreme Court of the United States.

October Term, 1913.

Nos. 97, 98.

Supreme Court, U. S.
FILED
JAN 3 1914
JAMES D. MAHER
CLERK

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION,

Appellants,

v.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellees.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION,

Appellants,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Appellees.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

SUPPLEMENTAL BRIEF FOR THE SOUTHERN PACIFIC COMPANY.

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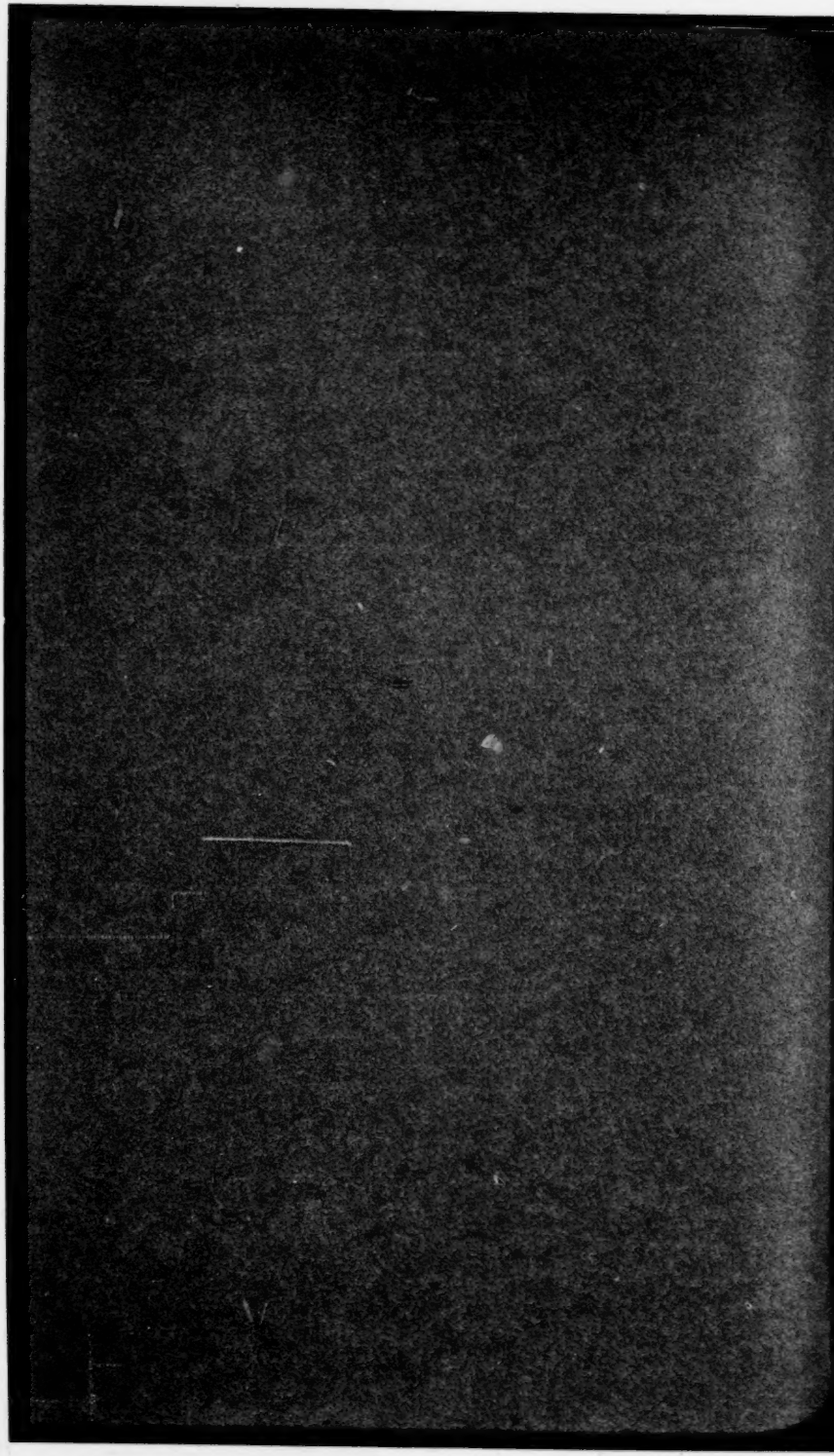

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, Appellants,

v.

SOUTHERN PACIFIC COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellees.

No. 97.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, ASSOCIATED JOBBERS OF LOS ANGELES, AND PACIFIC COAST JOBBERS AND MANUFACTURERS ASSOCIATION, Appellants,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, and SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY, Appellees.

No. 98.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

SUPPLEMENTAL BRIEF FOR THE SOUTHERN PACIFIC COMPANY.

Statement.

In view of the statement in the main brief of the Appellees to which this is supplemental no general

statement of the case is required. Such references to the facts as may be necessary to an understanding of the points covered hereby will be made in the course of the argument and unless otherwise stated will be understood to refer to the record in case No. 98, as both cases depend upon the same principles of law and in the proceedings before the Commission the report and opinion in case No. 97 merely referred to the opinion in No. 98 as containing an exposition of the principles upon which it was based. No attempt will be made herein to cover all of the issues of law in the case, but this brief will be confined to the following points:

FIRST. That it conclusively appears from the form of the order and the face of the Commission's report that the order is not predicated upon any finding of discrimination, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

SECOND. That such construction is erroneous.

THIRD. That in so far as the Commission's conclusion may be attempted to be based upon any assumed finding of equality of cost in team track and industry track delivery it is attempted to be based upon a finding not actually made and which if made is contrary to the undisputed evidence in the case.

FOURTH. That waiving for the moment the form of the order and evident erroneous construction of the statute upon which it is based it is conclusively shown that the tariffs of the carriers in imposing a terminal

charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul violate no provision of the act to regulate commerce; that the two services in question are not like services performed under similar circumstances and conditions and that the resultant difference in charges results in no undue preference but is justified both by the dissimilar circumstances and conditions under which rendered and by the added value of the service in connection with industry track delivery for which it is just to make an additional charge.

Although in the above specification of propositions to be discussed the expression "industry track delivery" is employed, it will be understood that the same legal principles apply to the receipt of carload freight upon industry tracks as distinguished from its receipt upon team tracks.

I.

It conclusively appears from the form of the order and the face of the Commission's Report that the order is not based upon any finding of discrimination under either the second or third sections, but upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment.

The positions of the Commission and the Government are not in accord. The Commission's brief (pages 22 and 31), asserts that the Commission's order is based upon a finding of discrimination in violation of Section

2 of the Act to Regulate Commerce in imposing a charge of $2.50 per car on shipments delivered upon industry tracks as distinguished from shipments delivered upon team tracks upon which no charge is made in addition to that named in the tariff for carriage to Los Angeles and San Francisco.

The Government's brief (p. 6), asserts that the order is based upon a discrimination against Los Angeles and San Francisco and in favor of other cities where no charge is imposed for industry track delivery.

Neither is correct. The order of the Commission shows upon its face that it is not an order to remove discrimination under either section. The opinion upon which it is based fails to disclose any finding of discrimination, but on the contrary, shows, upon its face, that the order is based, not upon discrimination, but upon the Commission's interpretation of the duty of the carrier and upon its conclusion that it has no right as a matter of law to impose a separate charge for industry track delivery although that separate charge may be separately stated and may be, as it is conceded to be, a reasonable charge for the service covered thereby.

Orders predicated upon discrimination proceed upon the assumption that the charge is in itself reasonable, as, indeed, is conceded here; but that the charge in comparison with some other charge or in the absence of a similar charge against some other person or community results in undue discrimination.

In such cases the offense of the carrier lies solely in the discrimination, that is to say in the improper relationship of its charges and the authority of the com-

mission is limited to an order to remove the discrimination, leaving the carrier at its option to bring the two situations into harmony with each other and the law by advancing one charge or reducing the other if the discrimination consist in an improper relationship between charges, or by cancelling one charge or imposing another if the discrimination result from charging for service in one instance and furnishing it free in another.

The Commission may not require the carriers to extend any service without compensation, nor can it look to the charge made for one service for any part or all of the compensation to which the carrier is entitled for another service. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.)

The order of the Commission in this case is not an order to cease and desist from making the charge of $2.50 per car for industry track delivery so long as no charge is made for team track delivery, or to cease and desist from making this charge at Los Angeles and San Francisco so long as it makes no charge for industry track delivery at other points. The order is to cease and desist from making any charge whatsoever. This order, if valid, cannot be supported as an exercise of the Commission's authority to remove discrimination, but only upon the theory that the carriers have no right as a matter of law to impose any charge whatsoever for this service over and above the charge named in the tariffs for transportation to and from Los Angeles or San Francisco, although those tariffs may, as they did in this instance, specifically establish a separate and additional charge for this service. That it is

so based and not upon discrimination is shown by the report and opinion of the Commission. In stating the issues as presented to it by the pleadings, the Commission says:

> "Complainant contends * * * that the compensation for that service is and must be included as a matter of law in the freight rate, and that the segregation of this charge is not permitted by law." (Rec. p. 43.)

Then follows a discussion of the nature of the service performed, a description of the various terminal facilities of the carrier, and of the contracts under which these industry tracks are constructed. The commission does, it is true, comment upon the general practice of American railroads to make no charge in addition to the haulage rate for either team track delivery or industry track delivery, but nowhere in the Commission's opinion does it find that the making of this charge at Los Angeles and San Francisco, which it finds has been there made for twenty-five years as distinguished from the general custom in this country, and the failure to make same at other points, constitute a discrimination against localities. The Commission's review of the practice of railroads at other points was clearly made, not as ground for finding discrimination against localities, but as a justification for its conclusion "that the rate which it is required shall be published is a complete rate, which includes not only the charge for hauling but the charge for the use of the terminals at both ends of the line" (Rec. p. 47), and for its conclusion that the terminal charges which may be

separately stated under section 6 of the act to regulate commerce, do not include charges for the receipt and delivery upon the carriers over terminal facilities. The concluding paragraph of the opinion says not one word about discrimination, but states that an order will be entered condemning as illegal and unjust the charge of $2.50 for industry track delivery (Record p. 55). Nothing could be plainer than the fact that the Commission's order is not predicated upon any discrimination, but is founded solely upon a legal conclusion that an interstate carrier in this country cannot make a separate charge for the receipt and delivery of freight at its terminals as distinguished from its charge for haulage between termini.

II.

The Commission's Construction of The Law Is Erroneous.

The first question presented, is the right of a carrier to state separately from its charge for the *carriage* of property between places, its terminal charges for the receipt and delivery of freight at these places. The Commission after commenting upon the English practice in separating the haulage from the terminal charge states:

> "This method of stating rates [English method] has never obtained in this country, at least so far as the records of this commission show. The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling but the charge

for the use of the terminals at both ends of the line.

"The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules which shall be published and filed with the commission, 'shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed,' it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of the line. The terminal charges referred to in section 6, and which must be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers." (Rec. p. 47.)

In so far as the Commission's order is based upon its construction of the statute as above set forth, it presents a question for judicial review.

The Commission's construction of the statute is clearly erroneous, because:

(*a*) it is contrary to the plain language of the statute interpreted in the light of the ordinary significance of the words employed; (*b*) it is contrary to the purpose

and scope of the statute as indicated by the history surrounding its enactment; and (*c*) [which may indeed be considered as a part of subdivision (*b*)] it loses sight of the state of the English statute and its judicial interpretation at the time of the enactment of the Act to Regulate Commerce, which is referred to by the Commission itself as one of the guides of interpretation for our statute, and has often been referred to by this Court as a similar guide because of the admitted fact that our statute was at least in part modelled thereon.

(a) *By the plain intendment of the language used, carriers performing a road service between termini may separately state the charges for carriage between places named in the tariffs and their own terminal services performed at the places between which such transportation is conducted.*

In its present form Section 6 provides as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates,

fares and charges applied to the through transportation. *The schedules printed* as aforesaid *by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall also state separately all terminal charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee.*"

The statute therefore plainly provides that every charge for every service must be published. It recognizes with equal plainness that the total service performed, in the language of the statute, "by *any* such common carrier" may consist of an aggregate of separate services, and that the charges for each of these separate services may either be stated separately or stated in the aggregate, but that in the event they are stated in the aggregate all privileges or facilities granted or rules or regulations which in any way affect or determine the value of the service rendered must be shown.

It is not contended that this statute requires that the carriers must separately state charges for the various services performed with respect to a given shipment, the aggregate of which constitutes the whole service performed by the carrier with respect thereto, but the statute plainly contemplates that the carrier may or may not so separate its charges, at its option; but that if it

does all charges in addition to the charge named for carriage between the places named which in any wise change, affect or determine any part or the aggregate of such aforesaid rates shall be published. Under the section as worded a carrier may at its option name a single lump charge for transportation and for icing, or it may separately state the charges for each. Likewise it may name a single charge to cover carriage between the places named and the terminal services performed, or it may separate those charges.

What, then, are the terminal services for which terminal charges may be made? The Century Dictionary, Volume 7, page 6242, gives as the first definition of the word *terminal:* Of, pertaining to, or forming a terminus or termination of something; as, the terminal facilities of a railway.

Section 3 of the Act to Regulate Commerce recognizes clearly the distinction between terminal facilities and main lines used for the carriage of freight, wherein it provides for the interchange of traffic between respective lines and prohibits discrimination as between connecting lines, but contains the saving clause: "This shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." The terminal facilities of a carrier, as distinguished from its tracks involved in the haulage of freight between stations, consist of its freight and passenger depots, side tracks, team tracks and all other instrumentalities used at the terminal in the receipt, delivery, storage or handling of freight. These terminal services are as necessary to the conduct

of the carrier's business as its main line and tracks ; but both in common parlance and under the Act to Regulate Commerce as reflected in Section 3 they are regarded as a separate and distinct class of facilities from the main line tracks. In view of this fact, the simplest and most reasonable construction of the expression *terminal charges* as used in Section 6 would mean charges for services performed on the carrier's terminal facilities as distinguished from services performed in the carriage of property between places.

Without regard to dictionary definitions or the recognition of terminal facilities as distinguished from main line tracks contained in Section 3 of the Act, it is a matter of common knowledge that in the transporta- of property by carriers the services performed may be divided into two main sub-divisions : the haulage of the freight between termini, and the services at the termini.

By the plain intendment of the language used the Congress intended that the carrier might state separately its charges for these two general classes of service. If, indeed, it does not permit this then the provision is of no meaning whatsoever. The Commission seems to have confounded the extent of the aggregate service which it is the duty of the carrier to furnish with the separation of charges for the component parts thereof and to assume that as a part of the carrier's duty is to make delivery at its terminal, the charge therefor must be included in the rate named for carriage between places. It will not do to say that the charges for services in respect to receipt and delivery of freight must be included within the charges named for the carriage of

property between places because it is a part of the transportation duty of the carrier to provide a place for the receipt and delivery of that freight as well as to carry it; for under the statute it is as much the duty of the carrier to furnish as a part of the transportation, and not as an independent service, icing, elevation, storage and handling of property, yet it will not be contended that the charges for these services when performed by the carrier performing the service of haulage or carriage may not be separately stated in the carrier's tariffs, and, indeed, the opinion of the Commission so concedes. (Rec., p. 47.) It is no more the duty of the carrier to furnish depots or tracks for the receipt and delivery of freight to be carried between the places named in its schedules than it is to furnish icing and refrigeration. The question is not how much service in the aggregate is the carrier required to perform, but whether it may separately state its charges for the several component parts of that aggregate service, which the statute plainly says it may do, and includes within the statement of charges which it may so separately state all terminal charges which may be imposed. But the Commission says that while terminal charges for the switching of cars at termini may be separately imposed when that switching is done by some line which has not performed a road service, no separate charge may be stated therefor when performed by the road line. The switching of the car is a terminal service, by whomsoever performed. The charge therefor is a terminal charge, by whomsoever made. The statute, so far from making the impo-

sition of a separate terminal charge depend upon the intervention of an independent terminal carrier, requires that any such common carrier (that is, any carrier engaged in interstate transportation) shall separately state the places between which property and passengers will be carried and all terminal charges which may affect the aggregate of the charges to be imposed: clearly contemplating the right of the carrier to separately state its own terminal charges if it chooses to do so.

Furthermore no direct provision for the separation of terminal charges from line charges was required in order to provide for the publication of rates to cover property carried to a given place by a given carrier and there delivered to a connecting terminal line for delivery upon a track or at a depot located upon the terminal line. Property handled by switch movement within a given city to affect delivery of a shipment which has moved into that city by another line is interstate commerce. (*McNeill* v. *Southern Ry. Co.* 202 U. S. 543.) When any two lines unite in the interstate transportation of property from point of origin to ultimate destination, whether the services of one of those lines be merely a switching service at point of origin or destination or whether it also comprehends a road haul, the manner in which the charges therefor are to be published is amply taken care of by other provisions of the statute which require that if a joint rate be established to cover the services of both lines it shall be published as a joint rate and filed with the Commission, and that where no joint rate has been established the total charge to be made shall be the

sum of the separately established and published charges of the several carriers. No separate provision therefore, looking to the separation of terminal charges from other charges, was required in order to provide for the publication of terminal charges imposed by a connecting switching line to be added to the charges named by the road line for the carriage of property between termini. In the absence of any provision looking to the separation of terminal charges, the connecting switching line must under the statute separately state its terminal charges, which are to be added to the road charges of the road line. It is therefore clear that the purpose of the provision under discussion was to permit the separation of the charges of a carrier performing both haulage and a terminal service as between those separate services performed by it, and that, in the language of the statute, those terminal charges which may be separately stated comprehend all terminal charges for all terminal services,—that is, for all services performed on the terminal facilities of the carrier. Under the literal construction of the statute in accordance with the ordinary acceptation of the words employed, its meaning is plain, and permits the separation of charges for all terminal services from the charges for the service of carriage between places. Where the meaning of the statute construed according to the literal significance of the words employed is plain, the courts will not by construction give to that statute a strained and unnatural meaning by disregarding the plain import of the language employed.

(b) *The Commission's construction is contrary to the purposes and scope of the statute as shown by its legislative history.*

The Act to Regulate Commerce grew out of a Senate Resolution of March 17, 1885, appointing a committee to investigate and report upon the subject of the regulation of railroad carriers and empowering the committee to summon witnesses. This committee reported on January 18, 1886, transmitting as a part of its report a complete printed transcript of the testimony taken by it, reference to which shows that in its investigation the committee had in mind the distinction between the terminal and haulage services of a carrier in connection with a given shipment and the propriety of a separation of the total charges as between the two. (Senate Report No. 46; 49th Congress, 1st Session, No. 2, pp. 892 to 894, 1084, 1161, 1256). Accompanying the report was Senate Bill No. 1093, 49th Congress, 1st Session, recommended by the committee for passage. Section 5 of this bill provided:

> "That every common carrier * * * shall * * * file * * * copies of all their tariffs of rates as well as all classifications, conditions and terminal charges which in any wise change, affect or determine any part or the aggregate of such tariff of charges and from time to time of changes in the same."

In the bill as finally passed (24 U. S. Statutes, 379) the subject-matter of Section 5 became a part of Section 6 and was changed to read:

> "That every common carrier * * * shall print and keep for public inspection schedules

> showing the rates, fares and charges for the transportation of passengers and property which any such common carrier has established, etc. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried * * * and shall also state separately the terminal charges and any rules or regulations which in any wise affect or determine any part or the aggregate of such aforesaid rates and fares and charges."

So far as the point in issue here is concerned, therefore, the change in the phraseology of the bill in its passage through Congress only served to make clearer the distinction between the charge *for carriage between places* and *the terminal charges* which might be added thereto at the termini for services rendered by any carrier subject to the act.

In 1906 the statute was again amended substituting the word "all" for the word "the", and permitting the separation of all terminal charges which might affect the rate still further evidencing the continuing intention of Congress that "any common carrier" might separate the charges for its aggregate service into separate charges for the various component parts of that service.

(c) *The Commission's construction is contrary to the construction of the English act at the time of the passage of the Act to Regulate Commerce.*

This court has frequently said that our law was modeled after the English statute, and that it would be

assumed that the courts had adopted the construction of similar provisions in the British law.

At the time of the passage of the Interstate Commerce Act in 1887, the English Railway Act of 1873 was in force. This act permitted, but did not require the separation of charges between charges for carriage or conveyance between places and terminal services. It also (Section 15) gave the Commission power—

> "To hear and determine any question or dispute which may arise with respect to the terminal charges of any railway, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery and other services of a like nature," etc. (*Boyle & Waghorn's Law Relating to Railway and Canal Traffic*, Vol. 2, p. 258.)

In *Hall* v. *London, Brighton & South Coast Railway Company*, 15 Q. B. D. 505, decided January 30, 1885, it appeared that the charter of the carrier required it to perform for a single maximum charge the service of conveyance and all services "incidental to conveyance", but permitted the imposition of additional charges for "services *incidental to the business of the carrier*" but distinct from the conveyance of the property between places named.

The court held that charges for station accommodations, the use of sidings, weighing, checking, clerkage, switching and labelling were not services incidental to conveyance but services incidental to the business of the carrier for which a charge additional to the charge for conveyance might be made. These charges are throughout the opinion of the court

designated generally as terminal charges over which the English Commission had been given jurisdiction under the section of the statute above referred to. It thus appears that at the time of the passage of the Interstate Commerce Act the phrase terminal charges as contained in the British statute had been construed so as to include the use of sidings for the receipt and delivery of freight, and that these charges had been judicially distinguished from charges for conveyance and services incidental thereto. Carriage and conveyance are, of course, synonymous, and in providing for the statement of places between which property will be carried and also for the separate statement of terminal charges our statutes made the precise distinction between the two classes of service made by the English law as construed by the English courts.

(d) *In the construction of this statute no assumed custom of embracing within a single charge compensation for these two services can weigh against the plain reading of the statute and the contemporaneous construction of similar provisions in the English law.*

The report of the Commission comments at length upon what it calls the "American custom" of naming a single charge to comprehend all services. So far as the custom in California is concerned it is stated by the Commission that the separation of this charge has been made as long as the carriers have had access to Los Angeles (Record p. 46). Furthermore, the Act to Regulate Commerce was not passed to perpetuate but to correct the customs of the carriers. No existing

custom of theirs can control the plain reading of the statute, particularly in the light of the history of its enactment, and the judicially construed provisions of the English law upon which it is modeled.

III.

In so far as the order is predicated upon any assumption that the cost of team track delivery and industry track delivery is the same, it is based upon an assumption warranted by no finding of the Commission, contrary to the undisputed evidence before the Commission, and contrary to the specific allegation of the petition, admitted by the motions of appellants, that the cost of industry track delivery is greater than the cost of team track delivery.

The only direct reference to the relative cost of public delivery upon the carrier's team tracks and private delivery upon industry tracks in the opinion of the Commission is the following sentence:

> "After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery." (Rec. p. 49.)

Considerable stress is laid upon this statement of the Commission by both the Government and the Commission in their briefs. We do not understand it to be contended, however, that the order is predicated upon this finding. The real foundation of the Commission's order, as plainly shown by its opinion, is that these industry tracks, although found by the Commission to

be constructed and operated not by virtue of any requirement of law but under private contracts, and although found by the Commission to be in each instance "a special and generally in practice an exclusive railroad depot for the carload freight of a shipper (Record, p. 45)," are for the time being a part of the terminal facilities of the appellees; that receipt and delivery thereon are substitutes for receipt and delivery upon public facilities of the appellees, and that therefore no additional or different service has been rendered for which a separate additional charge maybe made, but that delivery upon public team tracks, which it is the positive duty of the carriers to make, is a like service as delivery at these private depots for particular shippers which the law of common carriers does not require shall be made but is voluntarily made under contract. We do not understand that there is any pretense that this conclusion is based upon any assumption that the cost of the two services is the same, but that the statement that the Commission cannot find that the cost is any different is merely incidental to the main finding that the services are like services. As will presently be shown the legal quality and character of these services and their likeness in law or in fact cannot be determined by the question of comparative cost, but only by the nature of the service itself, and the circumstances and conditions under which it is performed and the purpose for which it is performed. But in so far as it may be urged that the order of the Commission is based either in whole or in part upon an assumption that the cost of the two is alike, it is based upon an

assumption that has no predicate in the findings of the Commission. Under the law as construed by this Court all charges made by the carriers are presumptively lawful and right, and the burden is upon the complainant before the Commission to show that they are in violation of some provision of the Act to Regulate Commerce. *Interstate Commerce Commission* vs. *Chicago Great Western Railway Company*, 209 U. S. 108.

This presumption can only be overthrown by the production of competent evidence before the Commission, and the Commission must first find upon the record that a violation exists, and the evidence of this violation must be found in the record made before the Commission itself and cannot be the result of conjecture or fiat. *Interstate Commerce Commission* vs. *Louisville & Nashville Railroad Company*, 227 U. S. 88–100.

If the legality of this charge, therefore, depends either in whole or in part upon equality of cost in the two services, then it was incumbent upon the complainants before the Commission to show, and upon the Commission to find by competent testimony that the cost was the same. The finding of the Commission falls far short of this requirement. It is not an affirmative finding that the cost is the same. It is rather a negative finding that the Commission cannot find from the whole record that the cost is different. Nor is this a mere quibble over words or phraseology. If there were no testimony whatever on the subject or if the testimony offered was unsatisfactory and lacked that

definiteness and certainty necessary for the ascertainment of actual comparative cost, the Commission might well say that it could not find that the cost was the greater, but such a finding could not be made the predicate for an order to cease and desist from making the charge if the illegality of that charge depended upon equality of cost of the two services; for it would be incumbent upon the complainants in such a case to show that the cost was the same, and if the record were silent upon that point or the testimony unsatisfactory, the Commission would have no right to piece out the insufficiency of the record by its own conjecture or opinion.

In the *Minnesota Rate Cases*, 230 U. S. 352, and *Missouri Rate Cases*, 230 U. S. 474, in which the legality of the charges made by the State depended upon the relation between the rates fixed by the state and the cost of service, this Court held that the question of cost was not a matter that could be determined by expert evidence or expert opinion, but that the question of cost was a question of fact, which could be determined only by the accurate segregation of operating expenses among the several classes of services rendered; and that rates fixed by public authority thereunto duly authorized and presumptively lawful could not be overthrown except upon competent proof of cost definitely and accurately ascertained in a proper manner. It would indeed be a remarkable construction of the law to say that where the legality of a carrier's charge, which is presumptively as lawful as the charge fixed by a State legislature, is dependent upon

the cost of performing the service for which that charge is made as compared with the cost of performing some other service, the issue of cost thus raised may be decided upon evidence any less clear and definite than is required where the rate is made by the State and the burden is upon the carrier to show the cost. If cost is the issue, then the rule for the ascertainment of that cost must be the same whether the carrier be the complainant or whether it be the defendant, and the conjecture or expert opinion of the Commission upon the issue cannot be substituted for definite and certain evidence any more than can the expert opinion of railroad presidents and experienced railroad officers whose expert opinion on the subject is certainly entitled to as much weight as that of an expert rate making tribunal.

If, therefore, this charge is legal if the cost is greater than that involved in team track delivery, but illegal if the cost is the same, it was incumbent upon the complainant to show that fact and upon the Commission to find that fact before the charge could be condemned, and the making of such a finding not upon conjecture but upon competent evidence would be jurisdictional to the making of the order.

The statement that the Commission cannot find that the service is more expensive than if all cars were given team track delivery falls far short of a finding that it is not more expensive. To say that the Commission cannot find that the cost is more expensive is merely to say that it is unable to find from the record that it is more expensive. But if the legality of the charge

depends upon equality of cost, it is not essential that the Commission be able to find from the record that the cost is more expensive. There was no obligation upon the carriers to show that the expense was greater. The burden was upon the complainants to show that the cost was equal. A statement that the Commission was unable to find that the expense was greater, therefore, could not be made the predicate of an order to cease and desist from making the charge, because it proceeds upon the assumption that there was some duty upon the carrier to prove the extent of the additional cost, whereas it was essential that the complainants should prove and the Commission should find that the cost was the same. It is quite a different thing to say that one cannot find from a record that a certain fact exists, than it is to say that one finds from a given record that a certain fact does not exist.

Even if the Commission's statement that it cannot find from the record that industry track service is more expensive to the carrier than if *all* cars were given team track delivery is considered as a definite finding that the cost is the same, any order predicated thereon in this case is void because contrary to the undisputed testimony. The appellees by their motions admitted the truth of every material averment in the bills of complaint. Those bills alleged that the public team tracks were sufficient in size to accommodate all shippers of carload freight; that connected therewith the carriers owned land sufficient to receive and deliver twice the amount of carload freight now handled; that these teamtracks are connected with

the main tracks of the carriers, while the industry tracks are located from 200 feet to seven miles distant from their main tracks; and that to deliver cars upon industry tracks it was necessary to move them from the main tracks of the carriers to the industries to which destined, and after the car had been unloaded in many instances to remove the empty, while in the case of outbound shipments it was necessary first to move an empty from the yards and main tracks of the carriers to the industry and then, after loading, switch the car from the industry track to the yards where the trains are made up. Any finding of the Commission contrary to the undisputed evidence is void, and allegations of what that undisputed evidence was are therefore material allegations and hence admitted by the appellees' motions. Indeed, the opinion of the Commission itself finds that the district within which these industry tracks are located is six or seven miles in length (Rec. p. 43). Under these undisputed facts a finding that the cost of delivering upon industry tracks is no greater than if all cars were given team track delivery is clearly contrary to the undisputed evidence.

A statement that the cost of delivering cars upon tracks connected with the main tracks is the same as the cost of delivering cars on tracks from 200 feet to seven miles distant from the main tracks is in itself so contrary to all reason and common sense as to be no finding of fact at all, but merely administrative fiat.

Furthermore, even if the average distance hauled to team tracks and to industry tracks were the same, it is

self-evident that to deliver a part of the cars upon industry tracks and a part of them upon team tracks is more expensive than it would be to deliver all of the cars upon team tracks. The Commission states that a train of freight cars goes first to the breaking up yards where it is divided up with respect to the character of the freight in the various cars and their destination (Rec. p. 49). Without this finding of the Commission, we think that the Court would take judicial notice that the final delivery of cars in large cities like San Francisco and Los Angeles cannot be made upon the tracks upon which the train is first placed upon its arrival. The various cars in the train must obviously be separated as between cars loaded with less than carload freight to be unloaded at the freight house, cars going to connecting lines, cars to be placed in outbound trains for transportation beyond, and cars containing carload freight for track delivery. Obviously this carload freight cannot be delivered upon the tracks at which the train is broken up, as the cars must be moved and shunted about until the several separations necessary have been made. It is equally obvious, however, that if a part of the carload freight is to be given track delivery on team tracks and a part upon industry tracks, additional switching service is required in the breaking up yards from that which would be required if all carload freight were to be placed upon a single team track or a yard of connected team tracks, for there must be a further separation of the cars as between those taking team track delivery and those taking industry track delivery, either in the breaking up yard or somewhere else.

Furthermore, if all cars were to be delivered upon the team tracks they could be placed there by a single movement of the engine and cars, placing the entire string upon the team track at one time; whereas, if deliveries are to be made partly upon the team track and partly upon industry tracks, those cars to be placed upon the team track may be so placed by a single movement of the engine, while each car or set of cars to be placed upon industry tracks requires in each instance a separate switching service.

To illustrate, let us assume the arrival of a train at Los Angeles containing, with other cars, 40 cars of carload freight, 20 for 20 different consignees for team track delivery, and 20 for 20 different consignees having industry tracks. Let us assume also that the average distance to the industry tracks is the same as the distance to the team tracks. The 20 cars for team track delivery may be moved at a single time to the team track and placed thereon with a single turning of the switch and a single movement of the engine. In the peddling of the 20 cars for industry track delivery a separate switch movement is required for each car, involving the stopping of the train, the throwing of the switch, the uncoupling of the car from the rest of the train and frequently the uncoupling of the engine, the spotting of the car at the industry, the re-coupling of the engine, the throwing of the switch back to the line up the main track, with a repetition of this performance for the delivery of every car; all of which takes time, consumes fuel, costs money and increases the wear and tear upon equipment and track.

These are matters of common knowledge. Any finding that the cost of delivering these 20 cars separately upon 20 separate industry tracks is the same as the cost of delivering the 20 cars destined for team track delivery, is against all human intelligence; and certainly the cost is of necessity greater than it would be to deliver all 40 cars upon the team tracks at one time. Even if we assume that the 40 cars start from the yard together and the 20 are delivered upon the team tracks and the other 20 upon 20 separate industry tracks, the cost of the entire movement must be greater than and cannot be the same as though the entire train were delivered upon the team tracks. Industry track switching requires the spotting of every car at the door or loading or unloading platform of the industry. Team-track delivery requires merely the delivery of the cars indiscriminately upon the team tracks where the shippers come and unload their freight. It is the difference between wholesale and retail switching delivery, the difference between wholesale and retail service, and this Court held in the *Party Rate Case, Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 284, that it would take notice of the fact that business could be done by wholesale more cheaply than by retail. Even though a railroad company may have two or three team-track yards in the same city it is self-evident that the cost of delivering all cars thereon would be less than to perform the peddling service involved in delivering on innumerable industry tracks.

There is furthermore the element of cost involved in the movement of the empty to the industry for load-

ing or from the industry after loading, which the bill alleges, and of which the Court will take judicial notice, is frequently required ; whereas, when loads are placed upon the team track they are available as soon as made empty for outbound loading. The Court will take judicial notice of the fact that when a loaded car is placed upon an industry track for unloading or an empty car upon the same track for loading, the engine and crew does not loiter in the vicinity awaiting the loading or unloading process in order that they may remove the car. They go on about their business and subsequently, sometimes days thereafter, must make another trip to take out the empty or the load. The engine does not, of course, under ordinary circumstances run from the yards with a single car to an industry track or to get a single car off an industry track, but picks up and distributes cars on one and the same trip, but the peddling service involved in industry track delivery must of necessity cost more money than it would if the cars were all loaded and unloaded at a single place.

The construction and maintenance of the additional tracks necessary to serve these industries is in itself an added element of expense caused solely by this service. Nor will it do to say that that if a part of the cars were not delivered upon industry tracks the carrier would be required to construct and maintain at additional expense additional team tracks; for it is alleged and admitted in this case that the team tracks are sufficient to accommodate all shippers of carload freight, and that land adjacent thereto is held by the carriers sufficient

in extent to provide public team track facilities to accommodate double the amount of business now done.

Under all of these facts any finding by the Commission to the effect that it is no more expensive to perform this peddling service upon industry tracks than it would be to deliver all cars upon team tracks is a finding contrary to the undisputed evidence in the case.

IV.

Waiving for the moment the form of the order and the evident erroneous construction of the statute upon which it is based, it is conclusively shown that the tariffs of the carriers in imposing a terminal charge for industry track delivery when made in connection with a line haul by the carrier making such delivery, while making no terminal charge for team track delivery incident to a line haul, violated no provision of the Act to Regulate Commerce; that the two services in question are not like services performed under similar circumstances and conditions; and that the resultant difference in charges results in no undue preference, but is justified both by the dissimilar circumstances and conditions under which rendered, and by the added value of the service in connection with industry track delivery, for which it is just to make an additional charge.

The facts are not in dispute. Whether under the facts stated a violation of either section 2 or 3 of the Act results, is a question of law upon which the conclusion of the Commission is reviewable by the courts.

Interstate Commerce Commission vs. *Baltimore & Ohio R. R.*, 225 U. S. 326.

United States vs. *Baltimore & Ohio R. R.*, decided December 1, 1913.

In the *Import Rate Case, Texas & Pacific Railroad Company* vs. *Interstate Commerce Commission*, 162 U. S. 197–219, the court said:

> "The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether difference in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were like, whether the transportation was effected under 'substantially similar circumstances and conditions'."

Neither the legal likeness of services rendered nor the similarity of circumstances and conditions under which performed can be determined by comparison of their cost. In *Union Pacific Railway Company* vs. *United States*, 117 U. S. 355, the charter of the railroad company required it to transport troops "at fair and reasonable rates of compensation not to exceed the amounts paid by private parties for the same service." A violation of the railroad's duty to the Government was sought to be predicated on account of the exaction of its local fare of $78.50 for the transportation of troops from Council Bluffs and Ogden, while for transportation between the same points of passengers ticketed through from New York it accepted $54. Obviously the cost to the railroad company was the same in each instance, the transportation being over the same rails and between the same points. The court held that there had been no violation of the road's charter, as the services were not "in law identical."

In the *Import Rate Case, Texas & Pacific R. R. Co.* vs. *Interstate Commerce Commission, supra*, the court held that the services rendered in the transportation of imports from the ports to the interior and in the transportation of domestic traffic from the same ports to the same points of destination were not like services in connection with like kinds of traffic under similar circumstances and conditions, and that the acceptance of a lower rate of the former as compared with the latter resulted in no undue preference under the third section, citing *Union Pacific R. R.* vs. *United States, supra.*

Obviously the cost of the performance of these two services was the same. It must, therefore, be regarded as settled that similarity of cost, even in the performance of services between the same points and over the same rails, does not constitute likeness of service or similarity of circumstances and conditions under which performed, or, standing alone, any ground for finding of undue discrimination.

Under these circumstances, therefore, it cannot be contended that equality of cost, even if it exists, renders two services alike in law performed not over the same rails and between the same points, but performed in the one instance to and upon team tracks, and in the other instance to and upon industry tracks, located varying distances apart. The right to make a distinction in charges, therefore, cannot be made to depend upon the question of cost, but it is to be determined by a consideration of the circumstances and conditions under which each is rendered and the nature of each.

The carrier was not required at common law to de-

liver at the rails of the shipper, nor anywhere else, except at its own public stations and yards.

Fenner v. *Buffalo, etc., R. Co.*, 44 N. Y. 505.

Witbeck v. *Holland*, 45 N. Y. 13.

Chalk v. *Charlotte, etc., R. Co.*, 85 N. C. 371.

South, etc., Alabama R. Co. v. *Wood*, 66 Ala. 167.

New Orleans, etc., R. Co. v. *Tyson*, 46 Miss. 729.

State v. *Republican Valley R. Co.*, 17 Nebr. 647.

Francis v. *Dubuque, etc., R. Co.*, 25 Iowa 60.

Evershed v. *London, etc., R. Co.*, 2 Q. B. Div. 254.

No provision of the Interstate Commerce Act requires it to do so. It must provide adequate public facilities for the receipt and delivery of freight. It is not required and cannot be required by any provision of the Interstate Commerce Act to provide industry tracks for the receipt and delivery of freight at private stations, nor can it be required except by contract to operate any such tracks when constructed. It may be required to install and operate "*upon reasonable terms*" switch connections between its own tracks already constructed and industry spur tracks which may have been already built up to the carrier's right of way, but it can-

not be required to construct or operate the industry spur itself.

Section 1 of the Act to Regulate Commerce.

Winters Metallic Paint Co. v. *C. M. & St. P.*, 16 I. C. C. 587.

Ralston Townsite Co. v. *M. P. Ry.*, 22 I. C. C. 354.

Imperial Wheel Co. v. *St. L. I. M. & S. Ry.*, 20 I. C. C. 56.

But under this statute the only duty is to operate "upon reasonable terms" a clear implication that Congress regarded even this service as a special additional service for which the carrier was entitled to compensation.

Prior to the amendment of 1906, a carrier could not even be required to construct and operate such switching connection; but, having established public facilities for the receipt and delivery of freight, could demand that all freight be received and delivered thereon. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 192 U. S. 568. And it cannot to-day be required to make delivery at the warehouse or plant of the shipper, but only to place his cars on the connection between the shipper's track and the carrier's track, and in so doing it will have effected all the delivery that the law requires. When the carrier goes beyond this and sets a car at the industry for unloading it has performed voluntarily a service which the law does not require. Obviously, in legal contemplation a service which, if extended, must be extended as a matter of favor, and a

service which may be demanded as a matter of right, cannot be regarded as like services nor as services performed under similar circumstances and conditions. To say that each is a means of accomplishing the carrier's duty of making final delivery of the freight and that, therefore, as that common object is fulfilled in each case, the services are alike, is to beg the question. Delivery made according to the mandate of the law upon a public track where the consignee must come and get his property is neither in fact nor in law a like service as compared with delivery upon the consignee's private track at his warehouse door, required by no law but voluntarily done by the carrier.

Furthermore actual additional physical services are performed in connection with industry track delivery, consisting of the additional switching service required in breaking up the train to separate cars for industry and team track delivery, additional switching service in spotting each car at the door or platform of the industry and delivering the cars one by one at each separate industry as compared with delivering all cars at one time and place.

One is wholesale delivery for the public *en masse*, the other is retail delivery for an individual shipper; and wholesale and retail services are not like services (*Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 284, *supra*).

Team track service is the delivery service of a common carrier by rail. Industry track service is the service of a peddler or a drayman, making delivery from house to house. The Court will take judicial notice of the fact

that except in a very few places the railroads of this country do not deliver packages shipped by rail at the house of the consignee, but that express companies do. Express companies, in other words, make what is commonly called store-door or house-door delivery, while railroads do not. If a man familiar with the services performed by railroads and express companies were asked whether the services they performed were or were not like services, there can be no doubt that his answer would be no; that when a package was shipped by freight he had to go to the freight house and get it, but that when it was shipped by express the express company delivered it to him at his door. And even the learned counsel for the Government and the Commission would, it is believed, have a very difficult time in convincing that man that the services performed by the railway company and the express company for him were like services. The service performed in industry track delivery is a service like unto a cartage service, not a service like unto delivery at the freight house or on the team track.

The Commission in its opinion realizes, as of course it must, that there is a difference in the service, but it says that service of store-door delivery is not an additional service but only a substituted service for delivery at the freight house or upon the team tracks; and comments upon the fact that the cars are not first placed upon the team track and then at the request of the shipper moved to the shipper's warehouse, but that the cars in the first instance go into the yards of the carriers, where the train is broken up and then are

moved directly to the team track and the industry track, respectively. The inference is plain that if public delivery was taken in the breaking-up yards of the carriers or if the cars ultimately delivered upon industry tracks were first switched to the team tracks and then switched to the industry track there would be an additional service for which the carriers would be entitled to compensation. But, as we view it, the mere manner of physical handling, or the fact that delivery upon industry tracks is substituted for delivery upon team tracks, is not determinative of the question as to whether an additional service has been performed. Obviously, for reasons already given, in large cities like San Francisco and Los Angeles public receipt and delivery of freight cannot be made upon the track upon which the train is first placed.

Nor is the fact that the carriers do not go through the idle form of first placing a car destined for industry track delivery upon the team track and then moving it from there to the industry track, determinative of the question as to whether there is an additional service rendered on these cars. The manner of handling may determine the relative cost of the two services, but it cannot be determinative of their quality.

Nor is the fact that delivery upon industry tracks is substituted for delivery which would otherwise be required on team tracks, determinative of the question as to whether an additional service has been performed. A given article or a given service may be substituted for another given article or another given service, but that does not make the two articles or services like

articles or services. Merchants are constantly endeavoring to press upon their patrons various substitutes for articles called for, but, although the use to which the substituted article may be put may be the same, we have never heard it contended that the article originally sought and that substituted for it were like articles.

Furthermore the substitution of industry track delivery for team track delivery is by no means of the essence of the service demanded or performed in connection with the former. Industry track delivery is not requested because it is a mere substitute for team track delivery. It is requested because in addition to the delivery of the freight itself, which the carrier is bound to give at some place or other, the consignee obtains as well a substitute for the cartage of the freight to his warehouse, which it is not the business or the duty of the carrier to perform. When industry track delivery is made the consignee has thereby been given two services: a delivery of the freight and the placing of that freight at his warehouse door without the intervention of a cartage service, which he would otherwise have to furnish at his own expense. It is because of this additional service which he secures that industry track delivery is requested. Industry track delivery is more than a substitute for team track delivery: it is a substitute for team track delivery plus cartage, as a result of which the consignee has obtained an additional service of value. A service which at one and the same time performs two functions and takes the place of two services which would otherwise have to be performed separately, cannot be considered a service like

unto one only of the two services for which it is substituted. The fact is it is like neither, but is *sui generis*. In the development of manufacturing processes inventive genius has produced machines which perform two or more functions for the performance of each of which separate machines were previously required. Industry track delivery, performing the functions of delivery of carrier and drayman combined, is no more like team track delivery than is one of these improved machines like either of those whose combined functions it performs.

Any construction of the second section which declares that industry track delivery and team track delivery are like services is destructive of the purpose and object of that section as hitherto declared by this Court. Beginning with the *Party Rate Case*, this Court has held that the purpose of the second section is to enforce equality between shippers over the same line, the same distance, under the same circumstances of carriage. In other words the second section was one of the remedial measures to prevent rebating or the extension of special privileges for the favored few. Indeed, it will not be denied that the principal mischief which the interstate Commerce Act was intended to cure was the granting of rebates and the extension of special privileges to the large shipping interests. The main purpose of the Act was to put the big shipper and the little shipper upon an equality.

It is admitted on the pleadings that, while the charge for industry track delivery was $2.50 per car, the cost of drayage was 50 cents a ton, or $7.50 a

car for a carload of only fifteen tons. Even under the charge of $2.50, therefore, the big shipper, with his large warehouse and private track, receives or ships his freight at less cost than does the small shipper, and solely on account of the service performed for him on this private track. We do not mean to say that the advantage which he thereby gains is an unlawful one, but the advantage is there. The imposition, therefore, of any additional charge by the carrier for industry track delivery tends to place the big shipper and the little shipper more nearly in a position of equality and is concededly in the furtherance of the main object of the Act to Regulate Commerce. If that act prevents the imposition of such charge, then the justice and propriety of making the same is a consideration which must, of course, be presented to Congress, and could not be urged here as a reason for its retention; but, unless the act clearly and unequivocally prohibits the imposition of such a charge, no strained construction of the statute should be indulged which will prevent the imposition of a charge, which when made is concededly in harmony with the general spirit of the Act to Regulate Commerce, which is to insure equality among shippers, and particularly to prevent the extension of special privileges or of rebates to the big shipper as against the little one.

It has been shown, it is believed, that to construe the expression *like services* so as to include therein both industry track delivery and team track delivery is a strained and unnatural construction, when the real substance of the two services is considered and the

legal duty of the carrier, on the one hand, to deliver upon its own premises freight offered for shipment, and of the shipper on the other hand to take possession thereof and cart at his own expense to his own warehouse, are borne in mind. Such a construction is not required by the literal reading of the statute itself, and is clearly opposed to the fundamental purpose of the statute. To say that the big and favored shipper, for whom there is performed a valuable addition to the mere delivery of the freight into his hands, which is inseparably connected with the delivery at his warehouse, and the elimination of cartage, may not be required to pay to the carrier an additional charge for this additional thing of value which he has obtained, whether the cost to the carrier be the same or not, is to disregard totally the element of the value of the service which the Commission itself has repeatedly held is one of the elements that must be considered in connection with any rate, and is subversive of the whole spirit of the Interstate Commerce Act, which requires that a shipper receiving a service of value beyond that rendered to his neighbor should pay therefor. Particularly should this be so when the additional service of value is one which the carrier is not required by law to perform. If the advantage which he gains is incidental merely to a service which the carrier is required to perform he cannot be required to pay for this incidental advantage, but when the additional service of value which he has received grows out of a service which the carrier is not required to perform it would indeed be a most remarkable construction of the act to say that it is unlawful to

make a charge therefor because by its performance the carrier has relieved itself of the duty of performing some other service of less value which the shipper does not want.

In a special report to Congress in 1903, a review of the forty years of rate making in the United States, the Commission said :

> " It was discovered early that the charges for transportation of different articles of freight could not be apportioned among such articles with regard alone to the cost of carriage. This basis of determining the charges it was found would confine to narrow limits the movement of different articles whose bulk would be made to pay disproportionately low rates.
>
> Under the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country and have a tendency to bring different sections into more intimate business and social relations could never have amounted to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded because the charge for carriage would be greater than it could bear. On the other hand the rates for the carriage of articles which, with small bulk or weight, con centrated great value would, on that system of making them, be absurdly low when compared to the value of the articles, and perhaps not less so when comparison was with the value of the service in transporting them.

> Accordingly, it was found not to be unjust to distribute the entire cost of service among all articles carried on a basis that gave greater consideration to the relative value of the service than to the cost. Such a method would be most beneficial to the country; it would enlarge commerce and extend communication, and would be better for the railroads because of the increased traffic which would be brought to them." (Commission's Report of 1903, Forty Years Rate Making in the United States, page 14.)

In re Investigation and Suspension of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio Railway, 22 I. C. C. 604, Mr. Commissioner Lane said:

> "Is a rate unreasonable because it does not pay its full share of taxes, fixed charges, and dividends? At the end this is the question to whieh we come in this case. The carriers themselves having fixed these rates under the mandate of the law that they shall fix just and reasonable rates, have they justified higher rates by showing that the existing rates which they had fixed fall somewhat short of meeting all the related expenses which the carrier must bear, not only for transportation but to secure an adequate return upon its property? Let us see where this doctrine would lead. If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or

silks, or high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the tariffs of every railroad in the United States must suffer a revolutionary change. In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase 'what the traffic will bear.' It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities. He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs than it imposed upon cotton. This would not be undue discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with

> the other, and one may reasonably bear a higher rate than the other upon public grounds."

The recognition of the value of the service as an element or standard of reasonable and just charges is vital. As pointed out by Mr. Commissioner Lane, to disregard the element of value of the service and impose upon all articles and all services charges equal to the cost and a proportionate share of the fixed charges and overhead expense, would be revolutionary not only to the rates of the country but to its commerce. If, therefore, the justice and legality of this charge is to be determined only by reference to the cost of the service, then one, and indeed the principal, element of reasonableness in rates or a relation between rates; viz., the value of the service, has been entirely overlooked. It clearly appears that for this service for which the carriers impose $2.50 a car, the industry track shipper has received a service which saves him an expense of from $7.50 to $20 a car for cartage or drayage, whereas the receiver or shipper on a team track must pay for this cartage or drayage in addition to the rate named for transportation to or from Los Angeles or San Francisco. In asserting that for the disproportionate value in service rendered to the two persons a difference in charges may lawfully be made, the carriers therefore are not seeking to impose unjust charges for services not rendered but are fighting for the preservation of the principle upon which their rates are constructed and, indeed upon which the Commission says it is proper that they should be constructed; viz., with regard not only to cost, but to

the value of the service—the preservation of a principle which is as essential to the commercial interests of the country as it is to its rail carriers.

So, if it be asked why, if the cost is not greater, we are not willing to perform industry track service without additional charge, we answer that upon principle, as charges are imposed in this country, we are entitled to a greater charge for a more valuable service, although the cost may be substantially the same.

Obviously, the cost of transporting one ton of valuable freight differs little if at all from the cost of transporting another ton of freight of the lowest grade and value. The difference in the rate is not charged on account of the difference in insurance risk, for the element of insurance is after all but slight. The difference in the charge is made because of the difference in the value of the service, and in this case we are entitled to the higher charge upon that ground. To make an additional charge for this additional service cannot be unjust or result in undue preference no matter what the relative cost.

There is still another reason, not probably of law but of policy, why we are interested in the principle involved in this case. The reports of the Commission are full of instances in which large industrial concerns have organized terminal railroads to perform industrial track service at their plants and then secured from the main or trunk line carriers a division of the through rate or an absorption of their switching charges, leading, as has been pointed out, to discrimination. To what extent these practices are fair and to

what extent they have resulted in discrimination it is impossible to state; but the opportunity for discrimination in favor of the large shipper, whose plant and business is of sufficient size to warrant the creation of a terminal line owned by the shipper, through allowances out of trunk line rates to these industry-owned railroads, recognized in most instances by the States of their creation as common carriers, is an ever present one; and it may well be that the simplest and perhaps the only possible solution of this vexed problem lies in the separation of the charges for industry or private track delivery from the charges for public track delivery, in which event the ownership of private tracks or of the tracks connected therewith which it is necessary to use to reach the same, becomes a matter of no importance.

It is respectfully submitted that the judgments of the Commerce Court should be affirmed.

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FILED
DEC 29 1913
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

Nos. 97 and 98

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association,
Appellants,

vs.

Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company,
Appellees.

—

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association,
Appellants,

vs.

The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railroad Company,
Appellees.

} Appeals from the United States Commerce Court.

BRIEF FOR APPELLEES.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

Nos. 97 and 98

The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, *Appellants*, vs. Southern Pacific Company, and The Atchison, Topeka & Santa Fe Railway Company, *Appellees*.	Appeals from the United States Commerce Court.
The Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers & Manufacturers Association, *Appellants*, vs. The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company and San Pedro, Los Angeles & Salt Lake Railroad Company, *Appellees*.	

BRIEF FOR APPELLEES.

STATEMENT.

The statements of appellants are not sufficiently comprehensive.

These cases involve the correctness and validity of a ruling or decision of the Interstate Commerce Commission holding as invalid ostensibly under Section 1 of the Interstate Commerce Law a tariff

charge of $2.50 imposed under the tariffs of the respective railway companies for switching loaded cars to and from the private industries or plants located upon respective industrial or spur tracks connected with the switching and main tracks of the respective railroads in Los Angeles and San Francisco and which charge for such service, separately stated in the respective tariffs filed with the Commission, was imposed in addition to the freight rates applicable upon the respective railroad lines for transportation of commodities to and from the cities in question. The Commission determined that the same charge when imposed by one of the companies for switching a carload of freight received from one of the other lines in such city to a private industry or plant located upon its spur track was reasonable and valid.

No. 97 involves the Commission's order made in the San Francisco case, but as the report (Tr., 34, 35) refers merely to the full report of the Commission made in the Los Angeles case in No. 98 we shall refer to the paging of the record in the latter case.

These suits were instituted by appellees against the Commission on June 1, 1910, in the United States Circuit Court, District of Kansas, to enjoin two orders made by the Commission. One, as stated, in respect to the San Francisco situation and the other in respect to Los Angeles. The orders in question were made prior to the Act of June 18, 1910, which, in some respects, amended the Interstate Commerce Law and also created the Commerce Court. The Commission filed an answer verified on information

and belief and the case was then transferred to the Commerce Court where the Government and other appellants intervened, and in which the Attorney General filed a motion to dismiss. (Tr., 80.) Complaining railway companies moved for a temporary injunction, filing affidavits in support of the verified bills, which affidavits have not been transmitted to this court. The Commission moved the court to proceed to a final determination of the issues without receiving testimony or other evidence. (Tr., 79.) Solicitor for the intervenors and for the Interstate Commerce Commission joined the Government in the presentation of the motion to dismiss. The case was heard also on the motion for a temporary injunction. The temporary injunction was granted and the motion to dismiss was denied. (Tr., 96, 97.) The opinion of the court is found on pages 83 to 96, inclusive.

The pertinent facts are few and comparatively simple. As the two cases are similar, for the sake of brevity, we will refer to the Los Angeles case alone.

Each of the railway companies operates its own line running to and from Los Angeles. In that city it has its yard tracks joining the main line where trains are made up for transportation over its own line or where trains which have been transported are broken up and cars distributed. A few hundred feet from this place are located its public team tracks or yards where carload freight received from the public in general is loaded and then put into an outgoing train or where carload freight hauled over

the line is placed for unloading by consignees in general not having industrial or side track facilities. However, in a number of instances, under special contract made between the railway company and the owner of a private industrial plant or warehouse, a spur track has been constructed connecting such private plant with the leads and switch tracks of the railway company and which spur track the railway company undertakes to maintain and operate for a fixed period of time. At the time of the making of these respective contracts, and since the passage of the Interstate Commerce Law in 1887, the railway company in its filed tariffs set forth the rates on the different commodities transported to or from Los Angeles, separately stating also a provision that for the service of switching a carload of freight to or from the various industries located upon the spur tracks in Los Angeles a charge of $2.50 for such service would be added to the rate and collected.

Bill for injunction.

After alleging the establishment and maintenance in said city by each of the railway companies of their respective public freight depot buildings for the receipt and delivery of freight, the bill, among other things, alleged (Tr., 3):

> "That each of said complainants * * * have also located and established and have maintained and do now maintain what are known as 'team tracks' and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of carload freight by respective shippers in said city destined for transportation to

various points upon their respective lines or to points on connecting lines of railroad in the United States; and where also is set and placed for the unloading thereof by consignees or owners in said city who have not been favored with the private or special side-track facilities hereinafter mentioned, carload freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere, to such owners or consignees in said city of Los Angeles; and said teaming tracks and freight sheds of said respective companies are so connected with the respective main-line tracks of the respective complainants in said city that cars loaded with carload freight may be readily transferred from said main-line tracks to said teaming tracks and sheds; and where empty cars intended to be loaded with carload freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said teaming tracks and freight sheds constitute and have constituted the places where the respective complainants receive and have heretofore received and have delivered and do now make deliveries of carload freight from and to the public in general in the said city of Los Angeles; and the same are and have been in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds and buildings above shown constitute the places established as depots or stations by each of the complainants respectively in said city of Los Angeles for the receipt, handling and delivery of carload and less than carload freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling and delivery of less than carload freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or

at any date can be tendered. The freight sheds and team tracks established and maintained for receipt, handling, and delivery of carload freight are sufficient to handle all the carload freight coming into or shipped from said city either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of carloads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all of said carload freight can be received, handled and delivered. In addition to this each of complainants has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of complainants' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth; and *in the investigation had by the Interstate Commerce Commission hereinafter referred to the undisputed evidence fully established the facts herein alleged.*"

It is then alleged that each of the railway companies severally or individually entered into contracts or agreements with certain individual ship-

pers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of a spur track from the respective plant or industry in said city to and connecting with the yard tracks of the respective complainant in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company, and a part by the shipper; that such tracks were constructed to specially accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective complainant, carload freight consigned to or shipped by the owner or operator of said plant and therefrom, and thus the owner or operator of such plant or industry located upon such spur or side track was relieved from the necessity of transferring carload freight to and from said team tracks and from and to such plant or industry by dray or cart or wagon at a higher cost and greater risk; and in being accorded such spur track facility the shipper at such industry or plant was given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks; that in such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years (usually less than five) a spur track to connect such plant or industry with the railroad of the railway company; but it was generally provided also that while the railway company might make use of the proposed

track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry, but that traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the Southern Pacific Company's contracts it was generally provided that the shipper would pay the cost of construction, the railway company furnishing all appliances and material; that the business of the shipper should always have preference over any other use to be made by the railway company of such tracks. The railway company was to keep the track in repair, and the shipper agreed to route all his freight over the railroad wherever the rates were as low as over other routes. In the contracts made by the Atchison Company it was generally provided that "title to the *track*," fixtures and appliances *furnished by the railway company* in its maintenance should remain its property; that the railway company might "use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the second party's business as little as possible." On termination of the contract the railway company was given the right to remove the track. Contracts made by the San Pedro, Los Angeles & Salt Lake Railroad were similar in form to those of the Southern Pacific.

It was alleged that the industries or plants under the Atchison Company's contracts were distant from the main track from 1/5 to 3¼ miles. Those on the Southern Pacific were distant from its main track from 200 feet to 7 miles; and those on the San Pedro,

Los Angeles & Salt Lake Railroad from 1/5 mile to 4 miles distant from its main track in the city.

That in order to receive a carload of freight from such plant or industry it is necessary to switch from the main track or yards of the respective complainant an empty car and set the same at such industry for loading, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a carload of freight is consigned to the operator of such plant or industry it is necessary to switch the same from the yards of the respective complainant over switches and such spur to the industry or plant in question and to place the same for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of the complainant.

It is then alleged that while in such contracts no specific sum was fixed or prescribed for the special service of switching in receiving or delivering freight at the plant or industry in question (as indeed could not lawfully be done, as it would have to be provided in the tariffs), yet at the time of executing such contracts the usual charge separately and specially set forth in the respective tariffs of respective complainants for making such special deliveries, or such special receipt of carload freight involving the switching service to and from such plant or industry from and to the yards of respective complainant where trains are made or broken up, had been generally established by each of the complainants at the sum or price of $2.50 per car, and had for many

years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of $2.50 has generally been made, maintained, and collected from such shippers in Los Angeles for said special service.

It is then alleged that this service of receiving and delivering carload freight at the respective industries or plants instead of at the team tracks or sheds is of great value and worth much more than $2.50 per car, inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of carload freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into; *that at the hearing before the Commission it was admitted of record by the shippers that said charge of* $2.50 *was reasonable for the service performed;* and it further appeared at said hearing that the general or prevailing charge for drayage was 50 cents a ton, making the cost to

the consignee of $7.50 on a carload of 15 tons, $10 on a carload of 20 tons, $15 on a carload of 30 tons, $20 on a carload of 40 tons, $25 on a carload of 50 tons, and so on, as against the charge of $2.50 imposed for switching to and from the shipper's warehouse.

It is alleged that in performing such special switching service to and from each industry or plant the railway company is put to a much greater expense than if such freight were received or delivered on its teaming tracks or at its freight sheds.

Reference is then made to the tariffs of the different railway companies in which it is shown that this switching charge is distinctly and separately set forth and stated.

It is alleged that the railway companies are not legally obliged to receive or deliver carload freight at any other place in said city than upon their respective team tracks or freight sheds where carload freight is delivered to or received from the public in general; that, therefore, when they voluntarily undertake for favored shippers to receive or deliver carload freight at points on other tracks or at other points in said city they have the lawful right to make an additional and separate charge therefor.

Reference is then made to the proceedings before the Commission and to the Commission's order complained of and grounds of the invalidity of the same are set forth. (Tr., 1-13.) For information of the court, copies of the pleadings before and report of the Commission are attached to the bill as exhibits.

Complaint before Commission.

Proceedings before the Commission were instituted by complaint of Associated Jobbers of Los Angeles claiming that at the instance of the railway companies many merchants and manufacturers procured business locations adjoining or within short distances from the terminal freight yards, erecting buildings thereon within switching limits, and in many cases upon land owned by the railway company and leased to such merchant or manufacturer; that spur or industry tracks leading from such warehouses and places of business were constructed under contracts with the respective railway company which the railway company "*might use for other purposes than delivery of freight to or receipt of freight from the merchant or manufacturer,*" and in which the railway company might remove the track on termination of the agreement.

It was claimed that these contracts made no provision for payment of the switching charge complained of (though of course it is admitted the tariffs did). It was claimed it was the duty of the railway company to deliver interstate freight at their respective terminals without further or other charge beyond the freight rate applying at such points duly established and published according to law and that each of the defendants enforced and charged without division with connecting carriers a separate and distinct charge in addition to such freight rate and known as a "switching charge" for receipt and delivery of carload freight upon such industry tracks in the sum of $2.50 per car. The tariff provision of

the respective companies covering the $2.50 charge for switching to these private industries or warehouses on private sidetracks mentioned in set out. (Tr., 18.)

Reference is then made to "'team tracks' upon which free deliveries and receipts of interstate carload freight are made and taken by said defendants, and each of them, without any switching charge whatsoever." It was then claimed that in other cities, such as Portland, Seattle, Tacoma, Ogden, Salt Lake, El Paso, Denver, Omaha, Kansas City, St. Paul, Minneapolis, Chicago, St. Louis, Cleveland, Pittsburgh, and others, it is the usage of common carriers to receive and deliver carload freight upon adjoining industry tracks free of any switching or extra charge. It was claimed that in some cities in California to which the same rates are made as to Los Angeles there are located individuals, firms and corporations competitors of the Los Angeles merchants and manufacturers and that at such places such a charge was not imposed. It was, therefore, claimed that the switching charge complained of was excessive, unjust, unreasonable and unlawful as in violation of Section 1 of the Interstate Commerce Law, because it was contended as a matter of law that this service was included in the transportation rate to and from Los Angeles; also that the imposition of the switching charge, or of any charge for such service, was an unjust discrimination against the merchants and manufacturers of Los Angeles and an undue and unreasonable preference and advantage in favor of competitive individuals, firms and corporations in the other cities named in

the complaint and was, therefore, violative of Sections 2 and 3 of the Act.

Commission's Report.

After investigation the Commission held that the charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within carrier's switching limits was unlawful when such carload freight was moving incidentally to a system line haul; but the charge was not unlawful when the carload freight was moving incidentally to a foreign line haul, that is, where the car had been transported by one of the companies to Los Angeles and was set upon the other company's track and transferred by the latter to an industry located upon one of its spurs.

The majority report is by Mr. Commissioner Lane. If we disentangle the real pertinent facts from purely argumentative matter, characterizations and generalizations they will be found to be few and simple. He states complainant's contention was "that the charge when made incident to a system line haul is illegal inasmuch as the service for which the charge is made is an ordinary and necessary incident of carriage, that the compensation for that service is and must be included *as a matter of law* in the freight rate, and *that the segregation of this charge is not permitted by law.*" He then says (Tr., 43):

> "Each of the carriers here involved has designated certain territory as within its switching or yard limits in the City of Los Angeles, extending for six or seven miles in a general easterly and westerly direction, and including numerous tracks, main

lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over and above the freight rate named in the tariffs, while at industry spurs an additional charge of $2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length, some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood."

He then states that these spurs have been constructed under contracts with the respective railway companies, setting out a portion of the provisions of such contract. He states (Tr., 44):

> "The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations, both of these contentions are sound."

He then says (Tr., 45):

> "In connecting its main line directly with a spur, the carrier serves itself in various ways; it gains an extension of its own line for various terminal uses, makes a new highway for intercommunication between the carrier and the industry and likewise between each industry so

> connected and all others having a similar connection, and it attaches the industry to the carrier in such a way that the latter has a practical assurance of the industry's traffic both outbound and inbound. On the other hand, there can be no doubt but that the industry also benefits by such connection, in that it can receive by this spur track direct delivery of its freight without the expense and trouble of draying to and from *public team tracks*. Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a *special*, and generally in practice *an exclusive, railroad depot for the carload freight of a particular shipper.*"

(That it is a *railroad* depot, of course, is apparently a mere assumption. It is in no sense a *railroad depot* because the spur is only used for the receipt or delivery of carload freight of a private or particular shipper or person. A depot is for the general public.) He then indulges in generalities to the effect that there are hundreds of thousands of such tracks in the country; that they have knowledge (mainly outside of the evidence before them) that without such tracks "the carriers *of the country*" would be lacking in adequate terminal facilities. (All of which has nothing to do with the particular case or the legality under the Interstate Commerce Law of the charge in question.)

Generalizing again he says that the "carriers of the land" treat such industry spurs as a portion of their terminals making no extra charge for service thereto and that, to such generalization, defendants could name as exceptions but three cities, Los Angeles, San Francisco and San Diego. (Of course de-

fendants were not called upon to designate other cities or to go into the general question as to what might be done by other railroad companies in other parts of the country.) But it does appear from the Commission's own report that where such service is rendered gratuitously in other places it was and is forced by competition—"a tribute to competition."

He further states (Tr., 46):

> "*It appears that the same charge for such delivery has been made by all the carriers at Los Angeles as long as the railroads have had access to that city.* It was first imposed by the Southern Pacific, and as the other lines came in they adopted the policy of the line already there."

He then refers to other places in California to which what are known as coast terminal rates apply, that is, rates lower than to intermediate points and where a charge for spur track delivery is not made.

He then indulges in an argument as to what is supposed to be covered in the "American railroad rate." He argues that the regular tariff rate as a matter of American law covers the service of receipt and delivery of freight at any and every point or place in a city reached by tracks and where freight may be received or delivered, and states that an additional charge could not lawfully be imposed unless the consignee first ordered the car to be placed upon a team track and then had the same switched to his industry. (Tr., 48.) He states (Tr., 49):

> "Spur track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal."

(He of course here forgot that the carrier did not solicit the right to give this service except upon payment of the tariff charge and while the industry may have paid the cost of construction or rather, *only* a part thereof, the carrier was out the cost of the appliances and materials and of maintaining and operating the track.) He then again generalizes by assuming that all this relieves the carrier's team tracks necessitating a less outlay for expense of yards "in a crowded city." (We are not concerned as to what may be the effect elsewhere than in Los Angeles.) He seems then to make a point that delivery given on an industry spur is not supplemental to any other delivery. (He overlooks altogether the proposition that delivery on such spur is a *special* delivery to a *special shipper*.) But because such shipper does not ask for or demand first delivery at the team tracks he seems to think that therefore the railway company cannot charge for switching to and from the private warehouse of the shipper. He then makes the general and rather unwarranted statement (Tr., 49) that "after a most exhaustive inquiry *we cannot find*, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team track delivery." (He probably means, in a general way, that if the carriers were obliged to increase their team track facilities to accommodate all business it would probably involve a great investment and indirectly make team track delivery more expensive than it now is, which is mere speculation. But it is idle to say that if all persons were given

team track delivery the service of making delivery there would be as expensive as under the existing method, because there is now involved when a train arrives in the city a cutting up of the same and segregation of the cars, switching to the team tracks of those to be placed there, and also switching to each separate private industry or plant each car to be set there. If all cars were destined for the team tracks, but one or two switching movements at most would be necessary. It is by reason of the service to the separate industries that the expense is increased and there is thereby imposed upon the team track delivery a greater expense than would otherwise be the case. It must be self-evident that it is more expensive to switch a number of cars and make a separate delivery of each car at each industry, upon each particular spur track, involving a separate service at fifty or more different places, than if the entire business were concentrated at one place, such as the public team tracks. There is the economy resulting from concentration as against the waste and added expense resulting from separation or diffusion of the business.)

He then states:

> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays."

(Here he assumes, contrary to the very face of the tariffs, that the rate made by the carriers to or from Los Angeles was intended to cover the special service of switching and delivering to a private industry in the city.)

He then states:

> "A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

(In other words, he assumes that the special service of making special delivery of a carload of freight to a single shipper at his private plant under special contract is a like service as making delivery of carload freight in another place on the public team tracks for one of the general public who has not been favored with a special spur track.)

He then takes up the question whether a similar charge of $2.50, imposed in addition to the freight rate, made by one of the companies for transferring a loaded car which had been hauled into the city by one of the other companies and was then transferred by the receiving company over its own switches to a private industry, was reasonable and lawful, and finds that it was. (Tr., 51-55.)

On page 55 he states:

> "We do not find in the record sufficient data upon which to base a finding, as to the reasonableness of the amount of this charge of $2.50 for interline switching to industry tracks, and for the purposes of the present order will assume it to be reasonable."

In conclusion he simply finds the switching charge, which he had condemned, to be illegal and unjust as a matter of law. He does not find it was violative of either Section 2 or 3 of the Act. He does not find there was any unjust discrimination as between shippers in Los Angeles, receiving like service, nor does he find nor could he find under the facts or the evi-

dence that these favored industrial plants in Los Angeles were subjected to an *unreasonable disadvantage* by reason of any *undue preferences* given to other competing shippers, if any, in other localities. None such are pointed out in the report.

Mr. Commissioner Prouty concurred (Tr., 55) upon the assumption that "the shipper by furnishing the track pays all he ought to for the privilege."

Mr. Commissioner Harlan concurred largely upon ethical grounds in view of what he supposed was the general practice of carriers in other parts of the country to absorb such charges. Among other things he states (Tr., 58):

> "It is not necessary to inquire whether, as between a shipper using a team track at one of these points and a shipper using a spur track, the charge against the latter is discriminatory; it cannot be doubted that a shipper on a spur track would willingly pay even more than the charge now exacted in order to avoid the liability to damage involved in loading and unloading a car on a team track and to save the larger cost of such handling by wagon. Nor is it necessary to inquire just how far the commerce of the three communities may be adversely affected in their competition with other communities."

Mr. Chairman Knapp dissented in an able opinion directed entirely to a legal discussion of the questions which were apparently ignored in the ruling of the Commission. He ably argues that the power of the Commission in the way of investigation and decision is confined to determining whether some particular provision of the Interstate Commerce

Law is being violated or not, and that they cannot indulge in generalties. He then states (Tr., 60):

> "Plainly, as between team track consignees and spur track consignees at Los Angeles there is absolutely nothing upon which the latter can predicate a violation of the third section. It may be that the exaction of this charge at Los Angeles, when no similar charge is imposed at other Pacific Coast terminals, except San Francisco and San Diego, gives an unjust advantage to competing shippers at terminal points where spur track delivery is made without additional charge. This aspect of the case was incidentally presented but was not made the subject of particular investigation. * * * I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los Angeles or imposing it at competing points found to be unduly favored. That Los Angeles shippers are at a disadvantage because of this charge in competition with interior or eastern shippers has certainly not been shown and could not be seriously contended."

Answering Commissioner Prouty's suggestion, he says (Tr., 63):

> "It is evident from what does appear that different spurs represent great differences in cost of construction, and it is equally apparent that there are great differences in the value of spur track delivery to different consignees, depending upon the number of cars received, the saving in cartage, and other circumstances. To say that the expense originally incurred by the shipper in securing spur track delivery under the standard contract, whether that expense was much or little, must

be regarded as compensation to the carrier for the indefinite future for performing the service of spur track delivery, however great or valuable that service may be, appears to me an indefensible proposition."

Nature of the order.

The order made by the Commission was absolute in its terms, requiring the defendant railway companies to desist from exacting their present charge of $2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and to abstain from exacting "*any charge whatever*" other than the charge for transportation from points of origin to destination for delivering or receiving carload freight to or from industries located upon such spurs. It did not require the defendants to remove any alleged discrimination complained of, which the carrier would be at liberty to do by imposing a similar charge upon other shippers or in other localities. The order proceeds upon the theory that "any charge whatever" for this service made in addition to the freight rate would be illegal *per se* although separately stated in the tariffs. No unlawful discrimination was found and the order does not proceed upon such a theory.

Some admitted facts and misconceptions.

The terminology, generalizations and characterization of certain facts and conditions no doubt tended to confuse the ideas of the learned Commissioner delivering the majority opinion as to the legal rights of the parties, but while such terminology may obscure the actual facts it cannot change them.

It is not very important whether the industrial spurs be characterized as "plant facilities" or "railroad terminals," nevertheless the Commission seems to have misapprehended the real contentions of the railway companies. So far as the spur track may be used in this special service of receiving and delivering freight at the private plant it is a facility constructed and used under the contract only for the benefit of such plant, though it may also be used incidentally by the railway company for some of its own purposes provided same does not interfere with the service to the plant. Any general designation cannot be regarded as decisive or determinative of the question here involved.

It is undisputed that each spur track was constructed under a special or particular agreement between the railway company and owner of the proposed industry; that it was by virtue of *such contract obligation only* that the railway company switched carload freight to and from such industries; that at the time such contract was made there was a provision in the railway company's tariffs fixing a charge of $2.50 per loaded car for such switching service and as this charge was inserted in the tariffs in compliance with the Interstate Commerce Law the railway company was legally obliged to exact the charge and the shipper to pay the same to as great an extent if not greater than if it had been specifically provided in the contract. Such shipper knew it was to his decided advantage to have this special service performed at the price stated including his incidental outlays rather than be obliged to accept or deliver

his freight upon the team tracks. If at any time he deemed the charge unreasonable or unduly burdensome for the service rendered he could direct delivery of or tender his freight upon the team tracks. The service of receiving and delivering carload freight at the plant of a single shipper with the necessary switching service connected therewith is in every sense a *special service* rendered under the contract and by virtue of the same. It is more valuable than and different from the service rendered to the public in general of delivery and receipt upon the public team tracks of the company.

It is also apparent that the Commission went outside of the record before it to obtain information as to some alleged practice or custom elsewhere in the country and even seems to have consulted its other records, but to what extent we are unable to surmise. Thus it is stated (Tr., 47):

> "This method of stating rates has never obtained in this country, at least so far as the records of this Commission show."

Had we any idea they intended to go upon such an excursion we might, had we deemed the matter at all pertinent from a legal standpoint, have inspected tariffs of other railways ourselves, and aided in the investigation.

ARGUMENT.

I.

THERE IS NO PRETENSE OF ANY ABUSE OF POWER BY THE COMMERCE COURT IN ISSUING THE INJUNCTION PENDENTE LITE.

A temporary injunction in this case was properly granted pending final hearing and trial in order to preserve the *status quo*, for if the railway companies were obliged in the meantime to comply with the order and eliminate the charge from their tariffs they would in the meantime lose this revenue and would never be able to recover the same under the law since their tariffs would then contain no such charge.

I High on Injunctions, 4th Ed., Sec. 5, 5a.
Allison v. *Carson*, 88 Fed., 581.
Spring Valley Water Co. v. *San Francisco*, 165 Fed., 657 and 666.

It can not be pretended that there was any abuse of power in the Commerce Court issuing the injunction *pendente lite* or overruling the motion to dismiss, and, to say the least, the case falls within the rulings of this court in *United States* v. *B. & O. R. R.*, 225 U. S., 306, in which it appeared that in that case, as in this, there was an application for a temporary injunction upon the bill of the railway companies and a motion of the United States to dismiss similar to the one at bar.

Notwithstanding the above would warrant af-

firmance of the order of the Commerce Court appealed from we are satisfied that under the undisputed pertinent facts the order of the Commission is founded upon a mistaken and erroneous conception and application of the Interstate Commerce Law.

II.

THE SWITCHING CHARGE IN QUESTION WAS NOT EMBRACED OR INCLUDED IN THE REGULAR RATE FOR TRANSPORTATION TO AND FROM LOS ANGELES. IT WAS IMPOSED TO COVER THE EXTRA OR SPECIAL SERVICE INVOLVED IN SWITCHING TO AND FROM EACH PRIVATE INDUSTRY UPON EACH SPUR TRACK WHEREBY PERSONAL DELIVERY TO A CONSIGNEE FAVORED WITH SUCH FACILITY WAS MADE. IT WAS DONE IN PUESUANCE OF CONTRACT BETWEEN THE PARTIES. AS THE RAILWAY COMPANY IS UNDER NO LEGAL DUTY TO MAKE SUCH A DELIVERY OR RECEIVE FREIGHT THERE THEN IF IT VOLUNTARILY CHOOSES TO DO SO IT MAY EXACT A SEPARATE AND ADDITIONAL CHARGE TO COVER SUCH SPECIAL SERVICE AS SUCH SERVICE IS ONE WHICH THE PUBLIC AT LARGE IN THAT CITY DO NOT DEMAND OR RECEIVE.

(a) *There was no dispute as to the meaning of the tariffs.*

At no time has there been any misconception or misunderstanding as to the meaning of the tariffs filed with the Commission. The Commission did not order the tariffs to be made more explicit. Upon their face, and as is apparent from the report of the Commission, the transportation rate for carrying any commodity to or from Los Angeles did not and

was not intended in fact to embrace or cover a service of making personal delivery to a consignee at his private plant or warehouse located upon some spur track in that city and which involved switching to or from such plant to the yard in which trains were made up or broken up. At no time was it ever understood while this charge was separately stated in the tariffs that the rate for transportation to and from Los Angeles in general would cover such delivery or receipt because the tariffs contained the provision that for such service an additional and separate charge would be imposed, which, it was claimed by complainants before the Commission, would be received and kept by the Los Angeles line and not divided like the freight rates with foreign lines.

It is obvious that so far as a proper construction of the tariffs were concerned the Railway Company never intended and shippers never understood that the ordinary rate on any commodity to or from Los Angeles covered compensation for making these special and, in a way, private or personal deliveries to certain favored shippers located upon spur tracks constructed under contracts giving them an interest in the same in connection with a qualified interest of the Railway Company.

That the switching charge covering this special service was not embraced in the ordinary freight rate covering transportation to and from the city is apparent from the fact that it is a flat charge of $2.50 for switching any loaded car regardless of the character of the freight therein or the actual

loading thereof, while the transportation rate to and from the city being based upon a fixed sum per hundredweight or per ton varying according to character of freight, the actual charge per car for such service would vary according to actual loading from minimum weight to capacity of the car and according to the character of freight loaded.

Of course the Commission well understood that to undertake to revise the tariffs by separately stating a freight rate to and from the team tracks to various points on the line, and other rates to cover the entire transportation to and from the various industries to points on the line, would not only make the confusion great, but would be impossible because of the fact that the switching charge was a flat sum imposed for that service alone regardless of the freight rate upon the commodity loaded. Moreover, separately switching a car is somewhat different from hauling the same car in a train over the road.

The Commission, however, did not order the tariff rates to be revised so as to include this special service. The service, properly speaking, was a switching service, treated as such by all parties and no complaint made upon that ground,—the sole complaint being that no charge at all should be imposed, largely because it was claimed that there was no separate charge made for delivery or receipt of carload freight on the team tracks.

After all a tariff is merely a sheet or document put out by the carrier, and now required by law to be made public and filed with the Commission, con-

taining the terms and charges which it offers to the public as the basis upon which it will contract to render the different services therein specified. Its meaning, or the extent to which any charge may carry, will be determined by the provisions of the tariffs read as an entirety and, in case of any ambiguity, as practically construed and applied.

(b) *The charge for this special service when imposed was properly and lawfully stated separately as in addition to the freight rate to and from the city, which, to say the least, covered service only rendered to the public in general.*

The order of the Commission, as shown by the majority opinion, is evidently based upon the assumption or decision that a freight rate to and from a given city as a matter of law must embrace within itself all compensation which might be earned for the receipt or delivery of freight at any point upon any of the carrier's tracks within its switching limits in such city wherever it may receive or deliver freight from or to *any* person, and that, therefore, a carrier may not lawfully segregate the rate from the switching charge or impose a separate charge for switching a single loaded car or two or more cars in connection with the receipt or delivery of freight at particular or special points within such switching limits, although such points or places are not the places where freight of the public in general in such city is received or delivered.

What reason can possibly exist for the establishment of any such rule?—a rule so rigid as to prevent a reasonable differentiation in rates and

charges based upon services rendered; a rule which would give to a few favored shippers located upon spurs, in a large sense *private, certainly private as to this particular service*, and receiving a service different from that rendered to the public in general, the same rate as that which is accorded to the public in general but who do not and cannot receive the special service in question because they have not been favored by the special facilities furnished under these special contracts.

What is there of magic in the statement of a freight rate or charge to or from a given city which would legally prevent the carrier from also stating and informing the public that those who desire a special delivery at their own warehouses located upon their spur tracks constructed and operated by the Railway Company by virtue of special contract shall be charged extra for such service? After all, how is it to be determined what the freight rates or charges to and from a given city do cover except from a construction as practically applied of the tariffs themselves, which, under the law, are required to be publicly filed and posted?

Outside of special agreement the duty of a railway company at common law and under the Interstate Commerce Act is only to the public in general and a single shipper can demand the performance of such duty only as he puts himself in the position or situation of one of the general public entitled to demand performance of the service in question.

A. T. & S. F. Ry. Co. v. *Tiedt*, 196 Fed., 348 (C. C. A. 7th Cir.).

It cannot be seriously doubted that outside of some contract obligations the Railway Company might lawfully insist upon receipt and delivery of all carload freight upon the team tracks and an owner of an industry located upon a spur without special agreement could not demand receipt or delivery of his carload freight elsewhere than upon such public team tracks. Receipt or delivery elsewhere would necessarily be a special service. No doubt he might be favored by the carrier by having delivery made at a more convenient point, but that would be a matter of favoritism which the carrier is not obliged to accord and could only accord in any event provided it did not result in undue prejudice to other shippers in the same locality. Because he does not want his delivery on the public team tracks is no justification for forcing or commanding the carrier to make without charge a special delivery for him at another place which the Commission is pleased to designate as "a *special* and generally in practice an *exclusive* railroad *depot* for the carload freight *of a particular shipper.*" Of course, it is obvious that the *plant* of the shipper is in no sense a *railroad* depot because the railway company has no control over the same and it is not a place where the company places for temporary storage freight received from or to be delivered to the public generally. But what justification is there for saying that, as a matter of law, a rate to or from the general depot of a railroad company in a given city necessarily includes also service for carrying to and from some other depot located in

another part of the city and upon other tracks of the company?

Would it not be lawful to make the tariff rates for transportation to and from a given city apply to freight received or delivered at a general depot of the company and then to provide that where the freight may be received or delivered at some outlying depot or depots within the same city a charge would be added to such rate? If such method is violative of any provision of the Interstate Commerce Law we respectfully ask, what provision? The jurisdiction of the Commission in investigating and making orders is confined in respect to "something done or omitted to be done" by a railway company "in contravention of some provision of" that Act.

Mr. Commissioner Knapp, in his opinion, said (Tr., 63):

> "I am convinced that an additional charge may lawfully be made for a private track or spur track delivery, because it is a special service which the carrier is not required to perform and a service of distinct value to the consignee, as compared with team track delivery, for which the carrier may rightfully exact compensation. The charge in this case is admittedly reasonable in amount and its imposition violates no law which the Commission is appointed to administer."

At common law and indeed so far as the Interstate Commerce Law is concerned, there is no insuperable objection, but on the contrary in the latter a plain provision under which the carrier may so separate its charges for distinct services so that each

shipper shall know what he is required to pay. It would certainly obviate a great deal of complaint of long standing favoritism if certain large shippers were required to pay for special services rendered to them which the public in general do not demand and of which they are in no position to take advantage.

(c) *The charge was separately stated in the tariff as required by Section 6 of the Interstate Commerce Law concerning terminal charges, etc.*

It is difficult to understand upon what provision of the Interstate Commerce Law the majority decision of the Commission was based. Reliance seems to be largely placed upon what was supposed by the Commission to be the American rule of stating rates and the Commission evidently decided that Section 6 of the Act neither required nor permitted a separate statement of this charge, but that under such section the service and compensation therefor was necessarily embraced in the rates or charges "between places" which the carrier was required to state under the first part of the section.

Ever since its enactment in February, 1887, the Interstate Commerce Law has not only authorized but in fact required a separate statement of all "terminal charges" when made, that is, of all charges imposed within or at a given terminal in addition to the rate of transportation to or from the place and which would in anywise affect the aggregate of the charges. (24 United States Statutes, 379.)

Section 6 of that Act required every common carrier to print and keep open to public inspection:

> "schedules showing the rates and fares and charges for the transportation * * * of passengers and property which any such common carrier has established and *which are in force at the time upon its railroad.* The schedules printed as aforesaid * * * shall plainly state *the places upon its railroad* between which property and passengers will be carried * * * and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

The purpose of that provision was palpable. It was to inform shippers generally of all charges which should be made for any and all services to be rendered, whether within or at the terminal, and the carrying charge to or from the place or locality, and for which service a charge might be made, so that they might be informed as to just what they could be required to pay.

The phrase "terminal charges" was well understood in the English Statutes and in the English decisions based thereon made prior to the adoption of the Interstate Commerce Act. As is well known, the latter Act adopted certain terms and provisions found in the English Statutes.

> *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 264, 284.

In speaking of "terminal charges" specified in the Railway & Canal Traffic Act of 1873 it is said by Boyle & Waghorn in their work, "The Law Relat-

ing to Railway and Canal Traffic," Volume 1, p. 112, as follows:

> "The various matters dealt with by it are all, to some extent, '*terminal charges.*' By Section 15, Railway and Canal Traffic Act, 1873, the Commissioners have power to hear and determine any questions or dispute which may arise with respect to the terminal charges of any railway company, when such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, *delivery*, and other services of a like nature."

In *Hall & Co.* v. *The London, Brighton & S. C. Ry. Co.*, L. R. 15 Q. B. D., 505, 533, 539, 540, decided in 1885, before the passage of the Interstate Commerce Law, a charge for shunting or switching cars within or at the terminal was spoken of as a "terminal charge."

The same view was taken in *Sowerby & Co.* v. *Great Northern Ry.*, 7 Railway and Canal Traffic Cases (B. & McN.), 156.

Section 15 of the Regulation of Railways Act of 1873, set forth in Volume 2, Boyle & Waghorn's "The Law Relating to Railway and Canal Traffic," p. 258, provided:

> "The Commissioners shall have power to hear and determine any question or dispute which may arise with respect to the *terminal charges* of any railway company, where such charges have not been fixed by any act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, *delivery*, and other services of a like nature."

"Terminal charges" are further mentioned and provided for in the Railway and Canal Traffic Act of 1888. Thus in Section 33 (Boyle & Waghorn, *supra*, Volume 2, p. 286), railway companies are required to render to shippers or those intending to ship an account in which the charge made or claimed by the company for the carriage of such merchandise shall be divided,

> "and the charge for conveyance over the railway shall be distinguished from the *terminal charges*, if any, and if any *terminal charge* or dock charge is included in such account, the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified."

In Section 55 of the same Act (2 Boyle & Waghorn, *supra*, p. 296), it is provided:

> "The term '*terminal charges*' includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat."

It was said by this court in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 284, with reference to another clause in the Interstate Commerce Act:

> "It may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute."

However that may be, it is pretty well settled that a switching service rendered within a terminal to make a special delivery of freight is appropriately regarded as a terminal service and one for which a separate, reasonable charge commensurate with the

value of the same may be imposed upon the party desiring and obtaining the benefit thereof.

National Tube Works Co. v. *Baltimore & Ohio R. Co.*, 8 Atl., 6.

4 Elliott on Railroads, Second Edition, Sec. 1566.

Owen v. *St. L. & S. F. R. R. Co.*, 83 Mo., 454; 25 American and English Railroad Cases, 371.

Sowerby & Co. v. *Great Northern Ry.*, 7 Railway and Canal Traffic Cases, 156.

Manchester, etc., Ry. v. *Pidcock & Co.*, 10 Railway and Canal Traffic Cases, 150.

MacNamara's Law of Carriers, pp. 226, 227.

D. G. H. & M. Ry. v. *Interstate Commerce Commission*, 74 Fed., 803; affirmed on appeal, 167 U. S., 633, 644-5.

In *Stone and Carten* v. *D. G. H. & M. R. Co.*, 3 Interstate Commerce Reports, 66, it was said shortly after the passage of the Interstate Commerce Law, by Commissioner Bragg:

> "*Terminal charges,* as such usually consist of *switching,* lighterage or trackage charges. Where these exist and are exceptional, as, for example, on shipments by rail from or to the harbor of New York, they are deducted in the shape of an arbitrary from the transportation rate, as part of the cost of transportation, before the balance of the transportation rate is divided among the carriers; and this imposes no additional charge upon the shipper or consignee. At Buffalo such terminal charges, on the other hand, enter into the division of the transportation rate among the carriers. Bridge tolls are in like manner often deducted as arbi-

traries from the transportation rate before the balance of the rate is divided among the carriers. *But at stations generally where terminal charges exist in the shape of switching or trackage charges these are made separable from and in addition to the transportation rate.* The watchful eye of the statute is seen, however, in requiring that all these terminal charges and methods, no matter how made, must be reasonable and just. The statute expressly requires that these, as well as the transportation rate, shall be separately stated in the schedules printed by the carrier and posted for public information, and in emphatic terms declares that neither must be made the means of any unjust discrimination or unlawful preference, or undue or unreasonable prejudice or disadvantage to any person, locality or traffic."

It seems, however, that Congress was not quite satisfied that the foregoing quoted provision of the Sixth Section was sufficiently definite to require a separate statement of all services and charges rendered in favor of any shipper or class of shippers in any given locality. That section was, therefore, amended by the Hepburn Law approved June 29, 1906, so as to provide as follows:

"That every common carrier * * * shall file with the Commission * * * and print and keep open to public inspection schedules showing *all the rates, fares and charges* for transportation between different *points* on its own route and between *points* on its own route and *points* on the route of any other carrier by railroad * * * when a through route and joint rate have been established. * * *

The schedules printed as aforesaid * * * shall plainly state the *places* between which property and passengers will be carried * * * and shall also state separately *all terminal*

> *charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.* * * *
>
> * * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, *nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property except such as are specified in such tariffs.*"

Plainer or more emphatic language could hardly be used. "The rates * * * for transportation *between different points* on its own route," etc., plainly has reference to rates available to shippers generally and, even if it should be conceded, for the purposes of argument, that such rates for transportation between the points mentioned in the tariffs must, as a matter of law, include or embrace incidental service of receipt or delivery, it is obvious it could only have reference to incidental receipt or delivery of freight at the generally established depots or public team tracks, as the case may be, where the public in general are served. It must be obvious, therefore, that if the railway company by reason of special arrangement or contract specially undertakes

to receive or deliver freight for an individual shipper at another place, as at his private plant or warehouse, and does make a charge therefor, that that must be separately stated in the tariff in addition to the freight rate to or from such city. It is also obvious that where the railway company even in the absence of a special agreement undertakes to render such special service by making such special or private delivery to a particular shipper, or to particular shippers, that that must be separately treated and separately stated in the tariffs.

Mr. Commissioner Knapp in his dissenting opinion said (Tr., 61):

> "The rate established by a railway company for transportation from city to city, or from station to station, provides for no more as a matter of law than general delivery at freight house or team track. Undoubtedly the carrier may, if it chooses to do so, render this additional service without extra compensation. But it is one thing to say that a carrier may perform such a service without charge and quite another thing to say that it must do so."

It can hardly be contended that the imposition and separately stating of this charge was violative of Section 1 of the Interstate Commerce Law which provides that "all charges for *any service* rendered or to be rendered in the transportation of passengers and property * * * *or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

It is also to be noted that in the above quoted

clause, and after the words "in connection therewith" in the original Act, there followed: "or for receiving, delivering, storage or handling of such property." (24 United States Statutes, p. 379.) These words were subsequently omitted in the revision of 1906 because they were covered in other parts of such revision. (Beale & Wyman on Railroad Rate Regulation, Sec. 912.) Such language certainly contemplated that there might be a separate charge for receiving or delivering freight.

That provision is but declaratory of the common law rule adopted to prevent the exaction of extortionate or excessive charges by common carriers and others.

Interstate Commerce Commission v. *B. & O. R. Co.*, 43 Fed., 37, 42.

Interstate Commerce Commission v. *B. & O. R. Co.*, 145 U. S., 263.

The common law rule is well stated in *Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 396, 399.

As generally understood it has only reference to the amount of the charge. If a charge is found unreasonable the Commission fixes another as a reasonable maximum. But that was not done here. That section had no prohibition against the segregation of charges. On the contrary it is to be construed in connection with Section 6 and in itself, plainly recognizes that there may be a separate charge for each and every service rendered.

The Commission was unable to find in its report that the charge in and of itself was excessive. It fixed no other charge for the service. Neither did

it find that the charge taken in connection with the through rates, which would, of course, involve a consideration of rates upon a great number of articles, was in the aggregate excessive. Yet so far as we are able to gather from the report, the Commission seemed to think that in some way or other the imposition of such a separate charge was, as a matter of law, violative of the first or sixth section,—its solicitor now seems to rely on the first section. It certainly made no finding, as we shall show, that it was violative of either Section 2 or 3 of the Act.

The learned Commissioner relied upon Beale & Wyman, "Railroad Rate Regulation," Sec. 694. In Section 693 of that work, while those authors correctly state the distinction that the rate should include compensation for *facilities* used in performing the service, they add:

> "This ought to hold true of all *usual* services which the carrier *must* render the shipper in the line of its duty, but as to services outside its obligation to the shipper it may render a separate bill if it pleases. More than this, there are, it must be admitted, certain extraordinary services in special kinds of shipments which are not required by shippers generally, and for which, it seems, it is more convenient, if indeed not more just, to make a separate charge."

(d) *The Chicago live stock switching cases are in point.*

In *Walker et al.* v. *Keenan et al.*, 73 Fed., 755, reversing Judge Grosscup's opinion in the case of *Union Trust Co.* v. *The Atchison, T. & S. F. Rld. Co.*, 64 Fed., 992, it was held by the Circuit Court of Appeals, Seventh Circuit, that where a railroad com-

pany undertook to deliver live stock at the Union Stock Yards in Chicago, which involved the use of the tracks of the Chicago Junction Railway Company under license of the latter company, a separate charge for such service commensurate with the value thereof in addition to the rate to Chicago might be lawfully made and this, notwithstanding the contention that the railroad company concerned did not have stock yards of its own at the terminus of its own rails in that city. It appeared that for years prior to 1894 the railroad company made deliveries of live stock at the Union Stock Yards (using under license the tracks of the Chicago Junction Railway Company), at a tariff rate from various points to Chicago. At that time the Junction Company imposed a trackage charge of 40 cents per car for the use of its tracks and the Santa Fe Railroad Company, or its receivers, thereupon inserted a provision in its tariffs to the effect that where stock was delivered at the Union Stock Yards in Chicago an additional charge of $2 per car for such service would be made. It was contended that the railroad company had no sufficient stock yards of its own for delivery of live stock in that city and that, therefore, the rate carried as it had theretofore delivery at the Union Stock Yards. But the court stated that as complainants were demanding delivery at the Union Stock Yards it was not for them to say that the stock yards of the Railroad Company in Chicago were insufficient. They were sufficient for all purposes of delivery there made. The court also held it was lawful to make the added charge. In that case it will also be observed that the Union

Stock Yards adopted by the railroad company was a place of general delivery for shippers in general; that as long as it was using the tracks of the Junction Railway Company for making such delivery it was not important under the Interstate Commerce Law what the arrangement therefor might be. The real point in the case was that the railroad company was not obligated and could not be compelled to make delivery at the Union Stock Yards. If it voluntarily undertook to do so it might make a separate and additional charge for its voluntary undertaking. The same is true in the case at bar . The obligation of the Railway Company to make special deliveries at private industrial plants is an obligation arising solely out of contract and not by virtue of any general duty.

After the above decision the shippers then brought the controversy before the Interstate Commerce Commission making a number of railroads defendants and claiming that the charge for switching and delivery at the Union Stock Yards was excessive and unlawful. The Commission in a way followed the above case as to right to make a separate charge, but, finding that the different railway companies therein involved did not have adequate facilities of their own and that they adopted the Union Stock Yards as their live stock depot, understook to find that the rate prior to 1894 to Chicago did cover in fact delivery at the Union Stock Yards, and as the railway companies were only put to the added expense of trackage charge which, of course, varied

somewhat, held that $2 was unreasonable and fixed a charge of $1.

Cattle Raisers' Association v. *Ft. Worth & D. C. Ry. Co.*, 7 I. C. C. Rep., 513, 547, 548.

That order the courts declined to enforce.

After the passage of the Hepburn Law the case was reheard by the Commission and a similar ruling, decision and order was made.

Cattle Raisers' Association v. *C. B. & Q. R. R. Co.*, 11 I. C. C. Rep., 277, 290, 291.

The railroad companies thereupon filed a plenary suit in equity to set aside the order as invalid largely upon the ground that the Commission had not considered the reasonableness of the switching charge in and of itself for that service alone. The order was held invalid.

Stickney et al. v. *Interstate Commerce Commission*, 164 Fed., 638.

That case was affirmed by this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S., 98.

So that this court held it was proper to separately state the switching charge and it was the duty of the Commission to consider and determine the reasonableness of that charge considered by itself and not in connection with the rate to Chicago.

Some point is made in the Government's brief, as was made in the opinion of Mr. Comissioner Lane, of a manifest slip in Mr. Justice Brewer's opinion in the case last cited, to the effect that the Chicago

Junction Railway or Stock Yards Company was affected by the order and would not receive reasonable compensation for the use of its property. The Chicago Junction Railway Company had been dismissed from the proceedings before the Commission and was not a party to the order. Neither was the Stock Yards Company. It was not performing the service in question. Its trackage charge was not affected and could not be affected by any ruling of the Commission.

The point in that case was not really that the service performed was *beyond* the terminal of the carrier and that, therefore, in such case it could only be properly segregated and separately stated, but rather that it was not the legal duty to deliver at the Union Stock Yards. "Terminal charges" are not necessarily confined to charges for services *beyond* the terminal but rather embrace service *at* and *within* the terminal.

Those cases also dispose of the point made by the Commission that the industrial shippers did not first demand or have delivery at the public team tracks and thereafter ask for the switching service. In the above cases the live stock shippers who were demanding and receiving delivery of stock at the Union Stock Yards did not ask for and first receive delivery at the stock yards of the Company in Chicago. Nevertheless, it was held that adding a switching charge, reasonable in itself, to the Chicago rate was legal in all respects.

(e) *Some other instances in which a separate charge has been imposed in addition to the usual rate.*

On many roads in the west, and probably in the east, it has at times been usual to charge 15 or 25 cents for a seat in a chair car or 50 cents for a seat in a parlor car in addition to the usual transportation rate per passenger which would only give him the right to a seat in the ordinary coach of the Company. It has never been conceived that because the passenger taking the chair or parlor car did not first occupy a seat in the ordinary coach that therefore it was unlawful to charge him the excess above mentioned.

So it is quite common at the present day to fix the charge for transportation of persons between Chicago and New York applicable to trains running on ordinary schedule time and to impose an additional charge of $10 or $20 per passenger applicable to practically the same kind of trains but running on limited time.

So also it has been frequent to impose an excess charge of 25 cents or so in addition to the regular passenger rate where the passenger did not procure a ticket before boarding the train. (*Sidman* v. *Richmond & Danville R. R. Co.*, 2 I. C. C. Rep., 766.) It has never been contended in such case that this excess or extra charge was illegal because the passenger by his failure to purchase a ticket relieved the railway company of the expense and obligation of printing and selling its tickets.

(f) *Not obligatory on the Railway Company to construct industrial spurs and deliver or receive freight thereon. Its obligation in that respect is wholly voluntary and contractual and it is therefore proper to impose a separate charge.*

It is well settled that railway companies are not under legal obligation to make personal delivery of freight to consignees. They are carriers by rail and generally make deliveries of freight only through their established depots or stations, or, in the case of carload consignments, upon their usual delivery or team tracks where delivery is made to shippers generally. Sidetracks running to private industries or warehouses of favored shippers have generally been constructed and are maintained and operated under some special contract or arrangement. The construction and maintenance of such sidetracks and the making of deliveries thereon to the private warehouses of certain shippers is a species of favoritism which the railway company is under no legal obligations to give. In the absence of some peculiar statutory provision a railway company was held under no legal obligations to construct or maintain a sidetrack to some private industry or to the private warehouse of some shipper mainly for the accommodation of the latter, and if it had constructed such sidetrack in the absence of some specific agreement it was under no obligations to continue the operation and maintenance thereof.

Jones v. *Newport News & M. V. Co.*, 65 Fed., 736 (C. C. A., 6th Cir.).

Mercantile Trust Co. v. *Col. S. & H. Rld.*, 90 Fed., 148.

Harp v. *Choctaw, O. & G. Rly.*, 118 Fed., 169, 178, 179.

Making delivery to a few favored shippers in a given locality at private warehouses located upon spur tracks is an extra or special service quite different from that which is given to the public in general. If such service has been in any case heretofore rendered free, then those shippers who have received the same have been unduly favored and have obtained an advantage over other shippers in the same city who might also be their competitors and who by reason of not being able to secure these spur track facilities are obliged to pay drayage or other charges to get their goods to their stores or warehouses.

In *Mann* v. *Pere Marquette R. Co.*, 135 Mich., 210, 219, it was held that a railway company in operating a sidetrack constructed under a similar form of contract to that found in these cases was not a common carrier.

In *Gulf Compress* v. *A. G. S. Ry. Co.*, 100 Miss., 582, 56 Southern, 666, it was held that a railway company was under no duty to deliver on private spur tracks.

It follows that if a railway company cannot be compelled to construct and operate a spur track to a private industry or to receive or deliver freight at the doors of such private industry, should it voluntarily undertake to do so, that is a matter of private arrangement. For that which it voluntarily does but is under no legal obligations to do it may at least make a distinct, separate and additional charge therefor commensurate with the value of the service rendered. The important question is, as stated, may the railway company make a separate charge for a

special service in addition to the usual rate found in its schedules for carriage of a carload in a freight train to and from a given city and which usual rate under the tariffs does not in fact cover or include the service of delivery at a private warehouse upon a spur track.

The only provision in the Interstate Commerce Law concerning switch connections is that found in Section 1 of the Hepburn Act, approved June 29, 1906 (34 U. S. Statutes, 584), amending the Interstate Commerce Law. It requires a common carrier to "construct, maintain and operate *upon reasonable terms* a switch *connection* with any * * * *private sidetrack which may be constructed to connect with its railroad,*" where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance thereof; and to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If it shall fail to install and operate such switch or connection, then on application of the shipper before the Commisison, it shall investigate and determine the safety and practicability and justification and reasonable compensation therefor, and the Commission may make an order as provided in Section 15, etc.

Such provision was not referred to or relied upon and, of course, was inapplicable as it only refers to a "*connection*" to be made with a private sidetrack. It does not require a railway to receive or deliver cars at the doors of the private industry or extend its track thereto. The provision may be invalid as it

requires expenditure by the railway company for a private not a public purpose:

Missouri Pacific Ry. Co. v. *Nebraska,* 217 U. S., 196.

Northern Pacific Rld. Co. v. *Railroad Commission,* 58 Wash., 360; 108 Pac., 938.

Brown v. *Gerald* (100 Me., 351), 61 Atl., 785.

Mays v. *Seaboard Air Line* (75 S. C., 455), 56 S. E., 30.

Of such sidetrack connections required to be constructed under a Nebraska statute it was said in *Missouri Pacific Ry. Co.* v. *Nebraska, supra,* page 206:

> "Moreover, a part of the company's roadbed is appropriated *mainly to a special use,* even if it be supposed that the sidetrack would be available incidentally for other things than to run cars to and from the elevator."

On page 207 it is further stated:

> "But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, *are private connections?*"

The above quoted provision, however, whether valid or invalid, and it is not necessary now to decide, plainly indicates the view that Congress did not understand that any provision of that act required that such switch connections should be operated without reasonable compensation. Such compensation would, of course, be fixed in addition to the regular or usual freight rate.

The case last above cited (*Mo. Pac. Rly.* v. *Nebraska*) is also pertinent to the effect that so far as serving the private industry may be concerned the

industrial spur constructed under contract was intended for a private purpose or use and the service to the industry is a private or special service.

It may be also considered as reasonably well settled that a railway company would not have power or authority to appropriate or condemn a right of way in order to construct a spur track to be operated for the special accommodation of one or a few shippers, as such use would be for a private and not a public purpose.

Pittsburgh, W. & K. R. R. Co. v. *Benwood Iron Works*, 31 W. Va., 710; 8 S. E., 453.

In re Split Rock Cable Road Co., 128 N. Y., 408; 28 N. E., 506.

Chattanooga Terminal Ry. Co. v. *Felton*, 69 Fed., 273, 279, 280.

C. & E. I. R. R. Co. v. *Wiltse*, 116 Ill., 419.

Brown v. *Gerald*, 100 Maine, 351; 61 Atl., 785.

It follows, therefore, that so far as the service here involved pertains to each industrial spur only for the accommodation or service of the private industry located thereon, such use and such service is special and, in a way, private and personal; and it is difficult, therefore, to understand how a charge for such service should, as a matter of law, be included in any freight rate which was intended to be generally applicable to shippers and consignees in common.

(g) *The Covington Stock Yards Case.*

The decision of this court in the *Covington Stock Yards Case*, 139 U. S., 128, seems to have been pro-

lific of much misconception as to what was there decided in respect to the carrying distance of a freight rate. It arose in 1886, prior to the passage of the Interstate Commerce Law, and no provision of that law was anywhere referred to in the opinion. So far, however, as the real point involved may be concerned the ultimate decision perhaps would not have been different.

It there appeared that the Kentucky Central Railroad was being operated by a receiver. It had no stock yards of its own in Covington but had made an exclusive contract with the Covington Stock Yards Company in which it agreed to make the yards of that company its "depot for delivery of all live stock" during the term of the contract, and not to build, "nor allow to be built," on its right of way, any other depot or yards for the reception of live stock. It was further provided that the Stock Yards Company might charge 60 cents per car upon all stock loaded or unloaded in the yards *"for passing such stock through the yards of said company to and from the cars of said railroad company."* In other words, the stock yards company was made an agency of the railroad company. Keith, a shipper and receiver of cattle, owned stock yards adjoining the railroad tracks and opposite those of the Covington Stock Yards Company. He declined to pay the charge exacted by the stock yards company and demanded delivery of his stock through his own yards or through the Covington Stock Yards free of the *"yardage" charge.* In June, 1886, he filed an intervening petition in the receivership case. The receiver vouched

in the Covington Stock Yards Company which was permitted to defend and which set up the contract in question. The court decreed it was the duty of the railroad company as a carrier of live stock to provide suitable *means and facilities* for receiving on board its cars live stock offered for shipment; that the contract between the railroad company and the Covington Stock Yards Company did not entitle the latter to impose upon any shipper of live stock over said road "*passing through the yards of said company to and from the cars of said railroad company,*" any charge whatever for such passage; that the Railroad Company not having provided a suitable depot except the yards of the stock yards company, it was decreed that the receiver receive and deliver from and to Keith *through the Covington Stock Yards,* all live stock shipped or offered for shipment upon consent of said Stock Yards Company, in writing, "*free of any charge for passage through said yards to and from the cars of said railroad company.*" *In default of such consent being filed* it was decreed that the stock should be received or delivered to Keith at his own platform. In the opinion it is said (page 133):

> "The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, *to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment* over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But, it is contended, that the de-

cree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, *for merely passing into and through the yards of the Covington Stock Yards Company to and from the cars of the railroad company.* As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public it the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, *that the carrier may, without a special contract for that purpose, require the shipper or consignee in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.*"

On page 136, the court continued:

"We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the City of Covington where persons engaged in buying, selling or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live

stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere '*yardage*,' they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish."

In this connection may be read with profit the able opinion of Mr. Justice Day in the Circuit Court of Appeals, Sixth Circuit, in the case of *Central Stock Yards Co.* v. *L. & N. R. R. Co.*, 118 Fed., 113, wherein it was held that while it was the duty of the carrier of live stock to provide reasonable facilities for unloading and care of such stock; that where it had done so, either by building stock yards of its own or by contract with a stock yards company, its refusal to deliver stock to other stock yards in the same city was not an unlawful dis-

crimination or violative of its legal obligations. That decision was affirmed in 192 U. S., 568. On page 572 Mr. Justice Holmes stated:

> "The court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad."

There is quite a difference between imposing an additional charge for the use of stock yards in receiving or delivering cattle and the charge imposed in this case of performing a special switching service and making special receipt or delivery of freight. There is quite a difference between charging for the performance of such service and a case wherein such charge is imposed and there is attempted to be also imposed another charge for using facilities necessary for the performance of the service. That was the distinction made in the Covington Stock Yards case.

(h) *Government's cases not in point.*

Cases cited in the Government's brief from the Supreme Court of Illinois are clearly not in point. *Chicago & N. W. Ry. Co.* v. *The People*, 56 Ill., 365, was a mandamus proceeding on relation of the owners of an elevator of grain in Chicago to compel the railway company to deliver to such elevator grain in bulk which might be consigned to it on the line of its road. The railroad company refused to deliver

grain to any other elevator in Chicago except that of Munn & Scott, although grain was accepted by the railroad company consigned to other elevators as well situated upon the tracks of the company. The decision in that case was based upon two earlier cases, one being that of *People ex rel.* v. *C. & A. R. R. Co.*, 55 Ill., 95, a like proceeding in mandamus for a like purpose, and the case of *Vincent et al.* v. *C. & A. R. R. Co.*, 49 Ill., 33. The decision in the last case was the basis of the decision in the two former cases. There a bill for injunction was filed to compel the railway company to deliver grain to plaintiff's warehouse in Chicago located upon its tracks therein where such grain was received by the railway company and consigned to the plaintiff's elevator. It seems the railway company had been delivering all such grain to the elevator of Munn & Scott and refused to deliver same to the elevator to which it was consigned without an extra extortionate charge, though the one elevator was as favorably located upon the railway tracks as the other. On page 40 of the opinion in that case it will be seen that a *statute of Illinois* made it unlawful for any railway company to deliver any grain to any warehouse other than into the one to which it was consigned without the consent of the consignor or consignee thereof, and making the railway company liable in damages not only to the owner but to the warehouseman.

It will thus be seen that these cases depended upon a specific statutory duty and also upon the fact that the grain was received by the railway consigned to the particular elevator. These cases are

well commented upon by Judge Taft in the case of *Jones* v. *Newport News*, 65 Fed., 736, wherein, after referring to those and other Illinois cases he stated:

> "They depended on *statutory obligations*, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention."

The case of *Coe* v. *L. & N. R. Co.*, 3 Fed., 775, contains an offhand opinion of Judge Baxter on an application for a temporary injunction to compel continuance of deliveries of live stock at Coe's stock yards. He was considerably influenced by the fact that plaintiff had invested a large sum in fitting up stock yards where for a number of years he had received live stock as consignee. The court held that a contract afterwards made between the railway company and the Union Stock Yards Company making the yards of the latter company the exclusive live stock depot of the railway company was invalid and directed the railway company to continue, pending litigation, deliveries of live stock at plaintiff's yards where the same were consigned to plaintiff. No authorities are cited in the opinion except the case of *Vincent* v. *C. & A. R. R. Co.*, 49 Ill., 33.

While in the Coe case no question was raised of the right to extra compensation for making delivery at Coe's stock yards, and the case would not be applicable, yet it is obvious that Judge Baxter's views are contrary to those expressed in *Central Stock Yards* v. *L. & N. R. R. Co.*, 118 Fed., 113, wherein the court passed upon the applicability of the provision against discrimination in the Kentucky Constitution as well as provisions of the Interstate Commerce

Law, and wherein the case was likened to one in which stock yards might be located upon the same railroad at the same place, and in which it was shown that in such cases there was no obligation to deliver to one stock yards because the railway company might deliver to another at another place under an exclusive contract with some stock yards company. As stated before, these views were confirmed by this court in 192 U. S., 572.

(i) *As to relative cost of this service.*

It seems to be contended that it costs no more to make the respective industrial deliveries than it does to make team track delivery and that, therefore, no separate or additional charge should be made. It is based upon the statement of the Commisssion that "after a most exhaustive inquiry *we cannot find* taking this service as a whole in the same way as it is treated by the carriers that the service is more expensive to the carrier than if all cars were given team track delivery." That is rather a broad and general statement and the Commission evidently included in their consideration the problematical expense of increasing the team tracks which might perhaps be necessary if all deliveries were made there. But, as stated by the Commerce Court, the contention is against the physical facts. It certainly costs more to switch a car to a private industry from one to seven miles than to switch one car with a number of others a few hundred feet to the team tracks. Then the separate maintenance and operation of separate industrial spurs makes the expense

upon the carrier greater than if all the tracks and all the work were concentrated at one place.

As stated heretofore if all deliveries were made on the team tracks the entire string of cars could be switched by one or two movements to that point, whereas now cars must be segregated and those intended for the team track switched there while each car intended for each separate industry must receive separate and particular attention and separate service.

The charge for this separate service is exceedingly low and evidently made in contemplation that these industries did not have cars first switched to the team tracks. That would have been altogether a useless and unnecessary operation.

It would evidently be cheaper in the first instance for the Railway Company to locate and construct its delivery tracks at one place than to pay for even a part of the construction of a great number of spur tracks and switches running to different special industries and to thereafter maintain and operate each one. It would also be much cheaper and easier in all respects for the Railway Company to make all of its deliveries upon the team tracks at one place than to make a part of its deliveries there and the rest to various industries situated in different localities and upon various numbers of other tracks.

But the cost of performing a particular service among a number of others, if indeed the same could be approximated, is not the only element which is to be considering in determining the reasonableness

of a charge. The Railway Company is entitled to something more than cost.

Southern Railway Co. v. *St. Louis Hay & Grain Co.*, 214 U. S., 297.

Interstate Commerce Commission v. *Stickney*, 215 U. S., 98.

The value of the service is an important and necessary element for consideration, and if we were to assume, for the sake of argument, that it costs no more to deliver a car at some particular industry than to deliver a car upon the public team tracks, yet it is admittedly of more value to the shipper to have the car delivered at his industry than upon the public team tracks. It is the value of the service which, after all, is to be ascertained.

Railroad Rate Regulation, by Beale & Wyman, Sec. 320.

Canada Southern Railway Co. v. *International Bridge Co.*, L. R. 8 App. Cas., 731, 732.

Kennebeck Water Dist. v. *Waterville*, 97 Me., 185; 54 Atl., 6.

It would be error in the Commission to ignore that element.

It may not cost more to transport a ton of pig iron or coal over a given line than to transport a ton of bar copper, but it is worth more to transport the latter because the service is worth more. As stated by Mr. Commissioner Knapp (Tr., 62):

> "If a carrier may make different rates on different articles because of differences in value,

> although carried at the same cost, why may not a carrier make differences in rates on the same article, although carried at the same cost, because of differences in place and manner of delivery which makes one kind of delivery much more desirable and valuable than the other? Are not the convenience and conceded saving cheaply purchased? Does not the spur track consignee in fact have an advantage over his team track competitor, a direct pecuniary advantage, much greater than $2.50 a car?"

Spur tracks were not constructed, or the undertaking of the Railway Company to make deliveries or take receipt of freight thereon made, with the view that the same could be done as cheaply as if made upon the public team tracks. On the contrary, from what incidentally is stated in the Commission's report, as well as by reason of the express provision of the contract, the main purpose of the Railway Company was to secure the traffic of the industry, the contract requiring routing of the same over the railroad in question; and that traffic was secured by tieing the shipper and his plant under the contract to the railroad.

The Commission, however, merely stated it was unable to find that it cost more to perform service at the spur tracks than if all cars were given team track delivery. That was merely negative and not equivalent to a finding that it was more expensive. The railways were not required to prove such fact to justify the imposition of the additional charge. Even if team track delivery were made without extra charge that would not justify holding invalid a charge for this special service unless it were con-

tended and found that it resulted in an undue preference of team track shippers and to the unreasonable disadvantage of spur track shippers. That is not even pretended.

It is difficult to understand why there should be such a straining at construction to give to these specially favored shippers all the benefits derived under their contracts and permit them at the same time to repudiate the condition, that is, the tariff charge, in view of which these contracts were made and in view of which the Railway Company agreed to render this service. It was stated by Mr. Commissioner Knapp:

> "I cannot escape the impression that their present effort to retain the benefits of spur track connection and delivery, and yet deprive the defendants of one of the material considerations for making these agreements, is not altogether free from criticism."

III.

THE IMPOSITION OF THIS CHARGE IS NOT SHOWN TO BE VIOLATIVE OF THE SECOND SECTION OF THE INTERSTATE COMMERCE LAW CONCERNING UNJUST DISCRIMINATIONS.

It is contended in the Commission's brief that the imposition of this charge for industrial switching and receipt and delivery of freight while none is made for delivery or receipt upon the team tracks in Los Angeles is violative of the second section of the act. That section provides:

> "That if any common carrier * * * shall,

directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, * * * than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination."

It refers only to discrimination between shippers and not between localities.

It was not contended in the complaint before the Commission that the industrial shippers were unjustly discriminated against by reason of any favoritism to the team track shippers in Los Angeles, because it was recognized that the former had a very decided advantage over the latter.

The foregoing provision is sufficiently definite in itself to be capable of judicial enforcement by the courts without preliminary action by the Commission.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S., 184.

In every case, therefore, the court may itself determine, as it has frequently done, whether as a matter of law, under the facts shown, there is a violation of the second section or not. Would it not be strange if that section could be so construed as to demand a species of favoritism which might likely be condemned under the third section, namely, by

forcing the carriers to forego this charge against industrial track shippers, thereby to give to such shippers an undue advantage, on the whole, over the team track shippers in that city? But the Commission itself did not state as a conclusion that the imposition of this rate was an unjust discrimination against the industrial plants and in favor of team track shippers or in violation of the second section of the act. It is true the Commission did state "A carrier may not so construct its rates as to compel an extra charge for like service and this, in our judgment, the defendants at Los Angeles have done." But that could refer only to the sixth section. The only pretended likeness in the service, however, was receipt or delivery in carload lots.

The statute speaks of "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." There must be service in transportation which is identical with or alike to the other compared and it must also be under substantially similar circumstances and *conditions* as the other, and it must be of a "*like kind of traffic.*" The Commission did not even find that the traffic at the respective places on the industrial as compared with that on the team tracks was of a like kind or that there was necessarily competition between the respective parties. But in any event the switching for the short distance to the team tracks for delivery thereon was not at all similar to switching to each of the various industries located some as far as seven miles away for delivery or receipt thereat.

The action of the carrier is not subject to *wholesale* condemnation. The switching is over different tracks altogether, and to different places. It is not rendered *under similar circumstances and conditions.*

Spur track service to each special shipper under special contract involves upkeep and separate operation of such spur track by the Railway Company, which track must be used primarily and preferentially for the business of such shipper and may be used only incidentally for railway purposes where the latter use will not interfere with the preferential use to be made in serving the particular industry. That alone differentiates such service from that rendered to the public at large on team tracks used for all indifferently.

The same may be said also with respect to the deliveries or receipt of freight. In the one case there is a special delivery to a single shipper by virtue of a special agreement or understanding. In the other case a general delivery to one of the public at large by virtue of a legal duty of the Railway Company.

The charge in question was imposed upon all shippers in like station in Los Angeles receiving the same special service. While the Railway Company might perhaps have graduated its charge to the different industries, it put them all on a parity and there is no pretense of any discrimination as between them. The discrimination condemned by the second section is one in favor of a particular shipper and against other shippers in a *like situation* which destroys that equality of treatment in

rates which it is the great purpose of the law to enforce.

American Sugar Refining Co. v. *D., L. & W. R. R. Co.*, 207 Fed., 733.

Speaking of this section in an early case the late Mr. Justice Jackson said in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed., 47:

> "When the traffic is not of like kind, or when the service is not 'alike and contemporaneous,' or when the transportation is not rendered 'under substantially the same circumstances and conditions,' differences in charges do not constitute 'unjust discrimination.'"

On page 49 he stated:

> "To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist *substantial identity of situation and of service*, accompanied by irregularity and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination."

But it is sufficient to say that at any time any of these industrial shippers may demand that his carload freight be received or delivered upon the team tracks at the same rate and on the same conditions as shippers in general, and upon what, therefore, may any unjust discrimination against him be predi-

cated? When he puts himself in a like situation demanding the same service that the public generally receive all are treated alike. It is only when he is demanding an extra or special service rendered by virtue of some special agreement and which a general shipper cannot demand or receive; that he is in an entirely different situation from the rest of the public and any claim of unjust discrimination is a mere sham.

It could not be pretended that an absolute refusal on the part of the railway company to construct these spur tracks, or to make deliveries at the private plants located thereon, constituted any unjust discrimination as against any such shippers and in favor of shippers using the public team tracks.

Central Stock Yards Co. v. *L. & N. Rld. Co.*, 118 Fed., 113, 117, 118.

How then can it be contended that when the railway company does undertake to make such a special delivery at a private plant that the imposition of a reasonable charge therefor results in an unjust discrimination against such shipper and in favor of those served only by the public team tracks? Is it not by virtue of his contract with the railway company that the spur track shipper gets a better and more desirable service than that received by one of the public at large at the public team tracks?

In *Penn Refining Co.* v. *Western New York & P. R. R. Co.*, 208 U. S., 208, an order of the Commission that carriers not charging for tanks on tank oil shipments desist from charging for the barrel

on barrel shipments or else furnish tank cars to all shippers applying therefor, was held to be equivalent to a holding that the charge for the barrel was not in itself excessive, and it was, therefore, also held that barrel oil shippers who had not demanded tank cars had not been discriminated against and were not entitled to reparation for the amounts paid by them on the barrels.

The English decisions are summed by Mr. Justice Brown in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S., 283, 284, as follows:

> "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

It is sometimes stated that the above section two is modeled somewhat after Section 90 of the Railway Clauses Act of 1845 of England, which required equality of rates for carriage of goods "passing only over the same portion of the railway" under the same circumstances. That section is quoted at large in *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, L. R. 11 Appeal Cases, 110. A comparison may be readily made. But in that case it was held (p. 111):

> "In order to bring the case within the language of the section, the termini both of *arrival* and *departure* must be the same."

It was intended to prevent favoritism where the services rendered respective shippers were identical and while allowing a varying of the tolls authorized

by the special act to be taken either upon the whole or upon any particular portions of the railway, provided, "that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing *only* over the same portion of the line of railway under the same circumstances." See also:

Manchester, Sheffield & Lincolnshire Ry. Co. v. *Denaby Main Colliery Co.*, L. R. 14 Q. B. Div., 223.

On page 224 in that case, Lord Lindley said:

"The expression, 'under the like circumstances, has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods."

Finnie v. *Glasgow Ry. Co.*, 2 McQ., 183.

Murray v. *Glasgow & Southwestern Ry. Co.*, 11 Court Sess. Cas., 4th Series, p. 205.

But it is contended that the court is precluded from inquiry or determination whether the Commission has correctly decided or determined the question of unjust discrimination under Section 2 and *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S., 235, is cited. We are, however, unable to find in the Commission's majority report any conclusion or finding of unjust discrimination as between shippers in Los Angeles. In the above case, however, this court did undertake to de-

termine the question of law whether there was an unjust discrimination under Section 2 and whether that section was properly applied. Speaking of the varied views of the Commission this court said on page 251:

> "On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured."

We do not understand that the court is precluded from inquiring whether the Commission has erred in the application of the law or miscontrued the same and that it has no power to correct such error by holding the Commission's decision and order to be invalid. (See *U. S. et al.* v. *B. & O. Rld. et al.*, decided Dec. 1, 1913.) On the contrary this court has held that whether under a given state of facts there is a violation of either the second or third section is a question of law upon which the conclusion of the Commission is not final. *Interstate Commerce Com.* v. *B. & O.*, 225 U. S., 326. We do not understand that in our bill we have gone farther than was sanctioned by this court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., 42, or in *Interstate Commerce Commission* v. *Stickney*, 215 U. S., 98. We do not understand that either of these cases have been questioned or criticised. Further than that, we allege that certain facts stated in the

bill were established by the undisputed evidence before the Commission. In the learned opinion of Mr. Justice Lamar in *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S., 88, it was stated:

> "In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc., Ry.*, 220 U. S., 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.'"

Notwithstanding this we feel that if the real facts pertinent to this particular case, even as suggested in the Commission's report, be segregated from the rather confusing terminology and generalizations, it is apparent the Commission has founded its decision upon a misconception of the requirements of the statute, and that its order founded thereon is plainly invalid.

IV.

THE CHARGE IS NOT FOUND TO BE VIOLATIVE OF THE THIRD SECTION OF THE INTERSTATE COMMERCE LAW CONCERNING UNDUE PREFERENCES.

It is not contended in the Commission's brief that the imposition of this switching charge at Los Angeles is found to violate the third section in any respect. In the Government's brief, while it is not contended that this section is violated as between shippers in Los Angeles, it is claimed but without in-

sistance to be violated as between industrial spur track shippers in Los Angeles compared with similar shippers in some other localities, though the localities are not pointed out or specified. It might be sufficient here to say that as the Commission has not found that the imposition of the charge upon the industrial spur shippers in Los Angeles and not imposing the same upon spur track industries located at other places upon lines of the respective railways gives such other shippers or localities *undue* or *unreasonable* preference or advantage whereby these Los Angeles shippers, or Los Angeles itself, is subjected to an *undue* or *unreasonable* prejudice or disadvantage, the Government's contention is without foundation. Nevertheless, to avoid misconception it may be proper to briefly suggest the following:

Any charge of violation of the undue preference clause must be confined to a consideration of places and shippers served by the particular railroad complained of and it is immaterial what its connections or other railroads may do or fail to do in other places.

Eau Claire Board of Trade v. *C., M. & St. P. Ry. Co.*, 4 I. C. C. Rep., 65, 78.

That proposition would seem to be self-evident.

Again, it would be necessary for the Commission to determine and point out in what other localities industrial spur track shippers upon the line in question were in competition with those in Los Angeles. For if there was no competition between them there could be no complaint that one received an undue

advantage to the unreasonable disadvantage of the other. As was well stated by Mr. Justice Jackson in *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 43 Fed., 47:

> "These words necessarily involve the idea or element of comparison of one service or traffic with another *similarly situated and circumstanced*, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to *competing parties*, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions."

See this case, also, on appeal:

> *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 263 (282).

See also *United States* v. *C. & N. W. Ry. Co.*, 127 Fed., 785, wherein it was held that the government, in the transportation of its troops, could not complain because it was not given the party rates which the tariffs of the railway company provided as open to theatrical troupes and others giving certain kinds of entertainments. In the opinion it is said, with reference to the Government:

> "It is not engaged in the same business as any of those classes that are given special rates, is not in *competition* with them, and is not therefore injured or discriminated against."

To the same effect see:

> *Hozier* v. *Caledonian Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 27.

Nicholson v. *Great Western Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 150.

Lees and others v. *The Lancashire & Yorkshire Ry. Co.*, 1 Nev. & MacN. (Railway & Canal Traffic Cases), 352.

In *Lincolnshire Patent Fuel Co., Ltd.*, v. *London and Northwestern Ry. Co. et al.*, 12 Railway & Canal Traffic Cases, 77, a railway company carried shipments of coal to certain sidings of a ship canal at a lower rate than they carried coal to a trader at the same sidings; such coal (which was in the form of slack) being then manufactured by the trader into patent fuel for shipment. Upon complaint by the trader that the railway company was unduly preferring the shipment of coal to his prejudice it was held that no competition existed between the coal carried for shipment and that carried for the trader; and that therefore the applicants had no *locus standi*. Also the fact that the trader manufactured the coal carried for him by the railway company into an article which might ultimately compete with the coal carried by the railway company for shipment was not bound to be taken into consideration by the railway company in regulating their charges.

See, also, Boyle and Waghorn on "The Law Relating to Railway and Canal Traffic," Volume 1, p. 159. On page 158 these authors sum up the English cases construing the undue preference clause, as follows:

"The words 'preference' and 'advantage' of

themselves give rise to questions of considerable importance.

Applicants occasionally desire to construe these words as the equivalent of 'benefit,' and to claim that whatever conveniences or concessions are granted to one trader or class of traffic are due to be granted to all others.

The courts do not accept this view; there is no question of preference when different matters are under consideration, and *one person is not placed at an advantage over another if their traffic has nothing in common.*

Expressing the point in another form, the courts read both limbs of the preference section together, and hold *that the preference of the first part must be accompanied with the prejudice of the other,* and that *the 'disadvantage' of the one must be connected with the 'advantage' of the other,* before the provisions of the section come into operation."

In *Phipps et al.* v. *London & Northwestern Ry. Co.,* 8 Nev. & MacN., L. R., Q. B. Div. (1892, Vol. 2), p. 229, Lord Herschell, referring to the undue preference clause, said on page 236:

"The question, therefore, which the tribunal, whether it be the court or the commissioners, before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other.

I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference."

Again, whether the alleged preference is undue or not depends largely upon whether at the one place or locality the railway company is forced by competition of markets or of other carriers to forego mak-

ing a charge, which it is not compelled to forego at the other point. That is an important element to be considered and to be given due effect by the Commission in any determination.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S., 42, 48.

Interstate Commerce Commission v. *C. G. W. Ry. Co.*, 209 U. S., 108, 119, and authorities cited therein.

Had the Commission found any *undue* preference, etc., it would have been incumbent upon it to point out the localities or shippers unduly favored so as to permit the carrier to obviate the preference in its own way. It could not make an arbitrary order requiring the carrier to forego imposing any charge altogether, or under any conditions. In such case the order would have to be made in the alternative so that the carrier would be at liberty to remove the complaint as to any unlawful preference by either foregoing the charge itself at Los Angeles or imposing a similar charge in the other localities found to be unduly preferred. As stated by Mr. Commissioner Knapp in his report:

> "This aspect of the case was incidentally presented but was not made the subject of particular investigation. If it is really desired to base a claim for relief upon this ground the complainant is entitled to further hearing in order that the facts may be fully developed. I apprehend, however, that a finding of undue prejudice to Los Angeles shippers for this reason would warrant no more than an order to cease and desist from the ascertained discrimination, which would leave to defendants the choice of discontinuing the charge at Los

> Angeles or imposing it at competing points found to be unduly favored. That Los Angeles shippers are at a disadvantage because of this charge in competition with interior or eastern shippers has certainly not been shown and could not be seriously contended."

In *Detroit, G. H. & M. Ry. Co.* v. *Interstate Commerce Commission,* 74 Fed., 803, 840, it was pertinently stated by the Circuit Court of Appeals:

> "Here was an arbitrary and peremptory order to abandon the accessorial cartage at Grand Rapids, without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia."

But the orders of the Commission were simply based upon the assumption that any rate for carriage to and from Los Angeles or San Francisco found in the tariffs, necessarily, as a matter of law, included a delivery or receipt of freight not only at the stations and public team tracks of the carrier, but at all private industries located upon tracks within the switching limits of the city. But there can be no legal objection so far as any requirement or prohibition of the Interstate Commerce Law may be concerned in a railway company establishing rates of carriage to and from a general central depot in any city and imposing an additional and separate charge where goods are received or delivered at some substation. But here we have a case in which a car which had been hauled over the line with other cars in a train is taken therefrom and receives a separate and special service of switching to a private industry. To hold that this special

switching service may not be treated separately and a separate charge imposed is to hold that by some inference or conjecture there is something in the Interstate Commerce Law which requires a railway company in establishing its rates to and from any given city to necessarily include in the rate compensation for receiving and delivering carload freight in every part of such city upon any of the tracks which it may have the right to use for any such purpose.

V.

THE COMMISSION ERRED AND WAS EVIDENTLY MISLED AS TO THE LAW BY ITS GENERAL INQUIRY AS TO THE SUPPOSED PRACTICE OF RAILWAY COMPANIES IN GENERAL MAKING FREE DELIVERIES AT PRIVATE INDUSTRIES AS THE SAME WOULD NOT DISCLOSE THE LEGAL DUTIES OF THE CARRIERS COMPLAINED AGAINST UNDER THE INTERSTATE COMMERCE LAW, AND THE COMMISSION WAS CONFINED IN ITS INVESTIGATION AND DECISION TO ASCERTAINING AND DETERMINING WHETHER THESE PARTICULAR RAILWAY COMPANIES, IN MAKING THE CHARGE COMPLAINED OF, WERE DOING OR OMITTING TO DO SOMETHING IN CONTRAVENTION OF SOME PROVISION OF THE INTERSTATE COMMERCE LAW.

The Commission seems to have gone far afield in order to ascertain the legal duty of the railway companies here involved by asking defendants' traffic men upon the stand whether there was not some practice or custom of railway companies generally to waive, absorb or not impose a separate charge for making deliveries at private industries located

upon spur tracks in various cities, and that for the purpose of ascertaining what was the rule of the American law as distinguished from the English. That was not a safe source of information as to the law. The railway companies, however, were not called upon in this case to show what the alleged practice or custom elsewhere was, or to show variations therefrom, or upon what considerations the same was founded. The information of their traffic men would probably be confined to their own lines and then might not be altogether accurate. No doubt, however, at a great many places railway companies through stress of competition or for the purpose of securing traffic of favored shippers, or for other special reasons, might deem it necessary or proper to make no separate charge for receipt at or delivery of freight to industries located upon spur tracks, and thereby may in fact, as shown by certain tariffs, extend the freight rate to all such industries to the same extent as to the place where public receipt and delivery is made. All that the alleged practice proves is that in some given cases a railway company has waived its right to make an additional and separate charge for such special service because no charge therefor was stated in the tariff. That, however, does not show that the particular charge is inherently unlawful, nor does it create a legal obligation to do the same thing at all other places unless it is shown that there would be a resultant violation of the third section of the Interstate Commerce Law, in which event the charge could not be condemned altogether, but the order would have to be in the alternative so as to permit

the carrier to obviate the unlawful preference in its own way.

The alleged custom would not alter the legal rights of a railway company except under contracts actually made while the practice was in force in the particular locality involved and was being observed and where the practice was not inconsistent with the contract or legal requirements.

It would no doubt be found, in a case where the inquiry was proper, that, as in the Express Cases, 117 U. S., 1, the supposed practice or custom had its origin in contracts; and it would no doubt be found that where spur tracks were constructed to private industries and freight was received at and delivered to the same, it was by virtue of some contract or definite arrangement between the railway company and the particular shipper. But no valid custom can have it origin in contracts. That alone destroys any claim of custom.

The terms "custom" and "usage" seem to be confounded and inappropriately used by the Commission in its opinion. A custom which has the binding effect of law in the absence of agreement is one which must have existed from a time "whence the memory of man runneth not to the contrary." It must have the force of law independent of persons consenting to it. It is a local common law.

I Chitty's Blackstone, star pages 74 to 80.

Ocean Beach Association et al. v. *Brinley,* 34 N. J. Eq., 438, 448.

Robinson v. *Mollett,* L. R. 7 Eng. & Ir. App., 802.

Hammerton v. *Honey,* 24 W. R., 603.

Hursh v. *North,* 40 Pa. St., 241, 243.

Custom and usage, in the way of practice, is generally shown in particular trades to show the understanding of parties to contracts where the practice or usage is not in contravention of agreement and is, therefore, supposed to be incorporated in the contract by assent of the parties. It then becomes a part of the contract where there is no stipulation or understanding to the contrary. In the case at bar it could not become a part of the contract as it would be contrary to a tariff provision as the tariff provision has the effect of law and must be observed by the parties.

In *Tilley* v. *County of Cook*, 103 U. S., 155, it is said on p. 162:

> "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. The inference from these principles is inevitable, that, unless some contract is shown, evidence of usage or custom is immaterial."

In *Ulmer* v. *Farnsworth*, 80 Maine, 500 (15 Atl., 65), it is said:

> "But usage or custom cannot be received to establish a liability, or to prove the origin of the relation by which the parties became responsible to each other. Such a usage may have an application to a contract previously existing, but cannot of itself create one."

See, also:

Eager v. *Atlas Insurance Co.*, 14 Pick., 141.
National Bank v. *Burkhardt*, 100 U. S., 692.

Thompson v. *Riggs*, 5 Wall., 663.
Albright v. *Cortright*, 64 N. J., 330; 45 Atl., 634.
G. C. & S. F. Ry. Co. v. *Miami Steamship Co.*, 30 C. C. A., 142, 155.

In addition to this it may be said that the *local custom* or usage in Los Angeles and San Francisco was to make such a charge for such service. But it may be added that no usage or custom could be shown to control the rights of the parties which would conflict with the law or require one of the parties to do something prohibited by that law as to require or permit a carrier to forego a charge for a special service which was made and provided for in its tariffs.

As stated heretofore, the alleged practice, where it prevails, of making free deliveries to private industries was necessarily the result of private arrangement between the particular shipper or owner of the private industry and the railway company. Such free deliveries were no doubt made in order to secure the trade of large customers, and quite likely considered in making or adjusting rates to the particular city. It was in the nature of a concession or privilege to secure such trade. It was a concession which one railway company gave to a favored shipper because another railway company was doing likewise in the struggle for business. It is a species of favoritism which seems to have survived to a large extent in some localities even after the passage of the Elkins and Hepburn laws.

No doubt it could be easily shown quite often or

in a number of instances that in the fierce struggle for business railway companies waived or absorbed charges for many services for which they might lawfully have exacted additional compensation and that to secure the business of large shippers they frequently granted them favors or concessions either openly or secretly. That was what induced complaints of the many smaller shippers not so favored and which led to the adoption of the Interstate Commerce Law and then, owing to its violation as shown at times even in favor of these shippers, finally to the more rigid and drastic provisions of the Hepburn Law. A reference to the old practice is obviously a poor criterion by which to judge of the legal rights of the respective parties.

Such practice, however, imposes no obligation for its continuance so far as any provision of the Interstate Commerce Law may be concerned. Indeed the spirit of that law would seem to require that this species of favoritism might well be discontinued or qualified by the imposition of an adequate and reasonable charge for the special service rendered.

In the case of *Providence Coal Co.* v. *Providence & Worcester R. R. Co.*, 1 I. C. C. Rep., 368, it was contended that because a railroad company had for many years paid the charge of hauling freight from nearby wharves to its station the practice had become a custom which the railroads were obliged to continue. On that point Chairman Cooley said:

> "Complainant insists that the defendant should pay the cost of hauling the coal from the wharf to defendants' freight station in Provi-

dence. But we do not think this can be required. It seems that defendant did this formerly but without any contract obligation to that effect; and, probably, only by way of encouraging complainant in building up a considerable trade. But what it did for a time as a favor or by way of encouragement it might discontinue at pleasure. There could be nothing in the nature of a binding usage about it."

See, also:

Texarkana & Ft. Worth Ry. Co. v. *Sabine Tram Co.*, 129 S. W., 198.

Any inquiry or finding by the Commission as to a supposed custom or usage at other places in the United States which would not result in an undue preference given by these particular carriers complained of at such places to the unreasonable disadvantage of Los Angeles or San Francisco would be beyond the powers of the Commission because not involving a violation of the Interstate Commerce Law.

The investigation of the Commission was based upon a complaint under Section 13 of the law permitting such complaint to be filed complaining "of *anything done or omitted to be done* by any common carrier subject to the provisions of this Act, *in contravention of the provisions thereof.*"

Now what provision of the Interstate Commerce Law was being violated? Beyond the specific requirements and prohibitions of that Act the carriers are at liberty "to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and gener-

ally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

Interstate Commerce Commission v. *C. G. W. Ry. Co.*, 209 U. S., 119.

Southern Pacific Co. v. *Interstate Commerce Commission*, 200 U. S., 554.

This case does not and did not involve any question as to the reasonableness of any regulation or practice of the carrier in respect to its transportation affecting its rates, such as classifications of freight, etc. There was simply involved the legality or right of the carrier in making and separately stating in its tariff a charge for a special service, in addition to freight rates therein, applicable to or from a given city. The alleged custom of railroads in other parts of the country, referred to in the Commission's report, in respect to absorbing in the freight rate any charges for such service, or rather, in respect to performing such service free of charge, was referred to by the Commission merely for the purpose of ascertaining what was supposed to be the rule of law in this country upon the question involved. The exercise of the legal right to make a separate charge for such special service cannot be denounced as an unreasonable practice for it is strictly in accordance with the law. It is no more a practice than is the making and imposing in tariffs of any other charge for any other service.

There was no violation made out or shown from the facts in the report of the Commission of Sections 1, 2 or 3 of the Interstate Commerce Law and

these were the only sections claimed by the complainants before the Commission to have been violated.

It is obvious, however, from the majority report of the Commission that its decision was based upon what the Commission conceived to be some general rule of American law with reference to transportation rates or charges and the effect of the same and at the same time it misconceived and misapplied the provisions of Section 6 of the Interstate Commerce Law. Whether its order was based upon some conception or misconception of the general law, or upon a misconstruction and misapplication of the Interstate Commerce Law, such order would be invalid as made without requisite authority. It should, therefore, be set aside. For reasons heretofore stated, the interlocutory decree and order of the Commerce Court should be affirmed with appropriate directions either to set aside the order of the Commission as invalid upon the face of its report, or to proceed with the final hearing.

These cases were originally instituted in the Circuit Court of the United States for the District of Kansas. The order of the Commission was made upon the complaint or petition of Associated Jobbers of Los Angeles, in the one case (No. 98, Rec., 14), and of Pacific Coast Jobbers & Manufacturers Association, in the other case (No. 97, Rec., 13). No residence was stated. The order does not relate to transportation but simply involves the validity of a charge found in the tariffs of certain carriers filed with the Commission, and as one

of the petitioners in court, The Atchison, Topeka & Santa Fe Railway Company, has its principal office in Kansas as alleged in these bills, the matter covered by the order of the Commission is deemed to arise in that District and, therefore, these cases should be remanded to the District Court of the United States for the District of Kansas, which is the successor of the Circuit Court in which the suits were originally instituted.

Respectfully submitted.

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